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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

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INTERNATIONAL LAW IN THE SUPREME COURT OF THE UNITED STATES

JAMES J. LENOIR*

The jurisprudence of national tribunals has become increasingly important as a source of the law of nations.[1] It has long been recognized that such tribunals have developed many of the customary standards and principles of public international law, and their jurisprudence has generally been based on foundations for which there was historical justification.[2] In this connection it is of interest to examine certain groups of cases decided by the Supreme Court of the United States in order to ascertain to what extent this national tribunal has contributed to the law of nations. Let us first examine the nature and position of international law according to the views of the Court.[3]

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[1]See MASTERS, INTERNATIONAL LAW IN NATIONAL COURTS (1932); CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS (1933); Series of *Fontes Juris Gentium* (edited by Victor Bruns, publication begun in 1931); McNair and Lauterpacht, Annual Digest of Public International Law Cases, 1925-1926 (1929); *ibid.*, 1927-1928 (1931); Williams and Lauterpacht, Annual Digest of Public International Law Cases, 1919-1922 (1932); *ibid.*, 1923-1924 (1933).

[2]1 HUDSON, INTERNATIONAL LEGISLATION (1931) xiii. Briefly, *International Law in England* (Jan. 1935) 51 L. Q. REV. 24, at 25, "The decisions of the English Courts, therefore, from the point of view of international law, are one of the sources of the raw materials out of which the international system is constructed. They are an important source, both because of the weight which the views of a great country properly carry in international affairs, and particularly because of the high prestige of our Courts."

[3]See the studies made by SMITH, THE AMERICAN SUPREME COURT AS AN INTERNATIONAL TRIBUNAL (1920); Brown, *The Supreme Court* (1909) American Society of International Law, Proceedings, 166; Peele, *The Court of Claims, ibid.*, 188; Wright, *Enforcement of International Law through Municipal Law in the United States* (1916) 5 UNIVERSITY OF ILLINOIS STUDIES IN THE SOCIAL SCIENCES; Potter, *Relative Authority of International Law and National Law in the United States* (1925) 19 AM. J. INT. L. 315; Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States* (1932) 26 AM. J. INT. L. 280; Scott, *The Legal Nature of International Law* (1907) 1 AM. J. INT. L. 831; Willoughby, *The Legal Nature of International Law* (1908) 2 AM. J. INT. L. 357.

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."[4] This assertion of Chief Justice Fuller would seem to indicate that in certain cases the Supreme Court will apply international law equally with the other forms of law mentioned. Indeed, in England and the United States international law is regarded as part of the common and municipal law.[5] The United States Constitution recognizes the fact in Article I, Section 8, where power is given to Congress to punish "offenses against the law of nations." Moreover, the Supreme Court has asserted: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; . . ."[6]

In one of the first important cases dealt with by the Court Justice Wilson, who had been a member of the constitutional convention said, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[7] A similar point of view has been taken in case after case decided by the Court. In one of the most recent decisions Justice Cardozo ransacked the whole law of England, America, and the continent of Europe in tracing the doctrine of the thalweg and applied that doctrine of international law to the particular case before the Court.[8]

If the Court applies international law as a part of the law of the United States, does it define it in definite terms or does it differentiate or separate it from other forms of law which it applies? Members of the Court at an early stage in its history laid down certain broad definitions which have been repeated in one form or another by a long list of jurists sitting on the Supreme Bench. Justice Chase explained in the

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[4]Kansas v. Colorado, 185 U. S. 125, 147, 46 L. ed. 838, 22 S. Ct. 552 (1902).

[5]See Peele, *loc. cit. supra* note 3; Sprout, *loc. cit. supra* note 3, at 294, who says, "Throughout a century and a quarter, the courts have quoted and requoted Lord Mansfield's dogma that international law is part of the municipal common law of the land, until, by sheer repetition, the paradoxical doctrine of uncertain origin has obtained a juristic position as solid as the rock of Gibraltar." Cf. Brierly, *loc. cit. supra* note 2, at 31, who says, "The case [West Rand Central Gold Mining Co., Ltd. v. The King (1905) 2 K. B. 391] is of interest also for a statement of the Court's view of the relation between international and English law, in qualification of the old doctrine, attributed by Lord Mansfield to Lord Talbot, that international law forms part of the law of England. Substantially the Court seems to have accepted what is surely the correct view, that international law is not a part, but is one of the sources, of English law."

[6]The Paquete Habana, 175 U. S. 677,700, 44 L. ed. 320, 20 S. Ct. 290 (1900). Justice Brown, *loc. cit supra* note 3, at 181, says, "The opinion (Gray's in the Paquete Habana) is one of the most learned to be found in our whole reports."

[7]Ware v. Hylton, 3 Dall 199, 281, 1 L. ed. 568 (1796).

[8]New Jersey v. Delaware, 291 U. S. 361, 78 L. ed. 847 (1934).

early case of *Ware v. Hylton*[9] that the law of nations was to be considered as "general," "conventional," or "customary." "The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations, who have adopted it." This assertion, made in the "twilight" stage of international law in this country, may not withstand an acid test of criticism, but it was an early recognition of a law which was thought to be sanctioned by the Constitution and considered as part of the law to be applied in American courts.

Chief Justice Marshall said that the law of nations was partially unwritten, and in part conventional, but he considered it as a source from which "we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America."[10] Moreover, by way of dictum, the great Chief Justice went further, speaking of the law of nations as "the law of all tribunals in the society of nations."[11] It was his opinion that until an act of Congress had been passed "the court is bound by the law of nations, which is a part of the law of the land."[12]

Marshall's view, which has been consistently followed by the Court, was still more forcefully stated by Justice Gray, considered by some as the most learned in international law of all the jurists who have graced the Supreme Court Bench. In *Hilton v. Guyot*[13] he said, "International Law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination." It would appear from this concise statement that the Court recognized the term international law in its comprehensive sense and defined it sufficiently to distinguish it at least from other forms of law applied by the federal courts.

Definitions formulated by the Court may not have added materially to those laid down by writers on international law, but the Court has consistently applied this law in its opinions and decisions, according to the necessities of the case. The early definitions were reiterated in clear

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[9]3 Dall. 199, 277, 1 L. ed. 568 (1796).

[10]Thirty Hogsheads of Sugar v. Boyle, 9 Cranch 191, 198, 3 L. ed. 701 (1815).

[11]Rose v. Himely, 4 Cranch 241, 277, 2 L. ed. 608 (1808).

[12]The Nereide, 9 Cranch 386, 422, 3 L. ed. 769 (1815); see, also, The Charming Betsey, 2 Cranch 64, 2 L. ed. 208 (1804), United States v. Arjona, 120 U. S. 479, 488, 30 L. ed. 728, 7 S. Ct. 628 (1887).

[13]159 U. S. 113, 163, 40 L. ed. 95, 16 S. Ct. 139 (1895).

and definite terms in the learned opinion of Justice Gray delivered in *The Paquete Habana.*[14]

The basis or foundation for the Court's application of international law is, of course, the Constitution which was supplemented by the Judiciary Act of 1789. It is often questioned whether the Court will assert jurisdiction if an act of Congress does not specifically grant it jurisdiction.[15] Publicists differ in their answer to this question. The Supreme Court's view as expressed by a number of justices is that international law will be applied equally with federal and state law. Even though it be granted that this is dictum only, it has been stated so repeatedly and in such strong terms that one seems to be justified in saying that it is an accepted principle followed by the Court.

Complete studies have been made, both in the United States and England, of the relation of international law to municipal law.[16] As was mentioned above, the Court has asserted and reiterated that the law of nations is part of the law of the United States. Is it a part of that law as a result of transformation in one form or another or is it such by its very nature? Justice Strong took the position in *The Scotia*[17] that no "single nation can change the law of the sea" and it would seem safe for us to assume that the United States through legislative action or judicial interpretation can not change international law. Yet in its quest for principles on which to base its decisions the Court has looked to those sources of international law available to it; and thus, those decisions are one of the sources "of the raw materials out of which the international system is constructed."

In any attempt to find out to what extent the Supreme Court has contributed to, added to, or affirmed commonly accepted principles of international law it is almost impossible to cover all the cases involving international law subjects. For the present discussion the writer has chosen certain topics which he considers of interest and importance in any study of the decisions of a national tribunal involving that law. It is not to be inferred, however, that a study of other topics would prove less interesting, or of less importance.

The first important case directly involving international law, *Ware v. Hylton*[18] decided in 1796, concerned the proper interpretation to be placed upon treaties. It would seem that most of the volumes of the

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[14]175 U. S. 677, 44 L. ed. 320, 20 S. Ct. 290 (1900).

[15]See Sprout, *loc. cit. supra* note 3, at 280; PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES (1928) 10-18; Potter, *loc. cit. supra* note 3, at 315.

[16]See, for example, Wright, *op. cit. supra* note 3, and PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND THE UNITED STATES OF AMERICA (1915).

[17]14 Wall. 170, 187, 20 L. ed. 822 (1871).

[18]3 Dall. 199, L. ed. 568 (1796).

United States *Reports* since that date contain one or more cases arising from treaties to which the United States is a party. Moreover, treaties and treaty cases have always been a subject of primary importance in the accepted works upon the law of nations. It was through treaties in one form or another that the United States began its relations with other countries. The Constitution recognized their place in our system of law and both federal and state judges have constantly applied them as part of the law of the United States.[19] Decisions involving treaties may be conveniently classified into two main groups as follows: 1. Cases in which the Court found it important to examine the nature of treaties and their position in the municipal law of the United States and 2. Cases in which the Court asserted principles or rules of treaty construction. With respect to this latter group of cases the question arises whether there are any accepted rules laid down by the Court and, if so, the extent to which the Court has actually contributed to the international law on treaties. A special phase of treaty construction concerns the effect on treaties of a war between the contracting parties.[20]

A second topic, rights and privileges of foreign states in suits before the Supreme Court, is primarily a matter of customary international law. One of the first important cases upon this subject was decided by the Supreme Court in an early stage of its history and has been widely quoted by writers upon international law as a contribution of the Court to the law of nations, both as concerns the rights of one state in the courts of another and as regards the immunities granted to a state by a foreign court.

The topic of piracy presents a phase of criminal law discussed in practically every work on international law as well as in histories and digests on criminal law. Although some writers consider it as purely a matter of history it is a matter of common knowledge that piratical depredations still occur, especially in the waters of the more remote and backward nations. Since piracy cases may easily come before the Supreme Court again, it is of interest to note the rules and principles on piracy which the Court has accepted, and the extent to which they are generally recognized today.

The recent Court decision of *United States v. Santos Flores*[21] which involved a murder on board an American vessel far in the interior of another country comes under the general heading of jurisdiction over criminal acts committed on foreign vessels within territorial waters. The

[19]See Lenoir, *Treaties and the Supreme Court* (1934) 1 U. of Chi. L. Rev. 602.

[20]Lenoir, *The Attitude of the Supreme Court as to the Effect of War on Treaties* (Feb. 1935) 7 Miss. L. J. 309.

[21]289 U. S. 137, 77 L. ed. 1086, 53 S. Ct. 580 (1933).

Supreme Court has had to decide not only concerning its jurisdiction over crimes committed on American merchant vessels while in the territorial waters of foreign countries but also as to its jurisdiction over crimes committed on foreign vessels while within the territorial limits of the United States. Since there is no uniform rule of international law on this subject the decisions of the Court are of importance in contributing to the development of such a rule.

Blockade will be the last topic to be considered. A large number of blockade cases have been decided by the Supreme Court, especially during and immediately following the Civil War. Undoubtedly the rulings of the Court on this subject are of primary importance in any discussion of the international law of blockade.

Let us now summarize the contribution which the Court has made to the phases of international law presented in the foregoing pages. To what extent has the Court contributed to, added to, or affirmed commonly accepted principles of international law?

In conclusion, one may point to the frequent statements by the Supreme Court of the United States that it will apply international law equally with other forms of law, according to the exigencies of the case,[32] and that it is "bound" by that law.[33] Such statements by a tribunal with the prestige of the Supreme Court lend weight to the rules recognized by that Court as rules of public international law. Though the decisions themselves may not be said to constitute new rules of international law, for no "single nation may change" the law of nations,[34] certainly the Court may, by granting its approval of principles formulated by publicists, hasten their crystallization into rules of law. Likewise, through its various interpretations, it may itself formulate new principles which through later recognition by other nations come to be accepted as rules of international law. By both of these processes the Supreme Court of the United States has contributed to the law of nations.

Let us note the contributions made by the Court to the international law on treaties. Here the principal contribution has been with respect to construction. In some instances the Court has expressly stated a policy for the particular case only; in others it has construed treaties either in the light of its own previous decisions or in accord with a more general

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[32]Kansas v. Colorado, 185 U. S. 125, 147, 46 L. ed. 838, 22 S. Ct. 552 (1902).

[33]Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568 (1796); The Nereide, 9 Cranch 388, 422, 3 L. ed. 769 (1815).

[34]The Scotia, 14 Wall. 170, 187, 20 L. ed. 822 (1871). Cf. Brierly, *loc. cit. supra* note 2, at 25, who says: "But it is important to remember that even some of the principles which have been most firmly established as law for English Courts represent no more than the national view of what international law is or ought to be."

public policy.[25] There is no rule of "liberal" construction which the Court is bound to apply, although it has, on occasion, construed treaties liberally in the interest of the other contracting party. The controlling factor in the Court's interpretation of treaties has been the intention of the parties.[26] Where the wording of a treaty has been clear and unambiguous the Court has accepted the text itself as the best evidence of the intention of the parties. Where the wording has not been so clear it has sought other evidence of intention such as *travaux preparatoires* and diplomatic correspondence.[27] In all cases it has sought to settle disputes so as to preserve the highest good faith and foster a feeling for the sanctity of treaties.[28] Hence, the Court has supported the doctrine of *pacta sunt servanda* and has departed therefrom only when compelled to do so by legislative enactments. The Court has expressed respect for existing rules of international law and, recognizing the territorial limits of its own jurisdiction, it has not attempted to extend its decisions farther than to the parties bringing suit in the particular case.

The Court applies treaties equally with other forms of national law without passing directly upon questions involving the international obligations of the United States. Nevertheless, it has said on occasion that no ruling made on treaties would in any way relieve the nation of its international responsibility, but that the question of international obligation was a matter for the determination of the political branches of the government.[29] Thus the Court has indicated that any modification of a treaty would be a proper subject matter for negotiation between the parties and that the Court's decision will apply only to the questions arising under the treaty.

The Court has contributed very little to the solution of the controversial question of the effect upon a treaty of a war between the contracting parties. Only two cases involving this question have come before the Court, and in one of them the decision was based upon other grounds.[30] As a principle of law, the Court has recognized the fact that

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[25]See BUTLER, TREATY MAKING POWER OF THE UNITED STATES (1904) 363-364, sec. 461.

[26]United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547 (1832); United States v. Texas, 162 U. S. 1, 40 L. ed. 867, 16 S. Ct. 725 (1896).

[27]Kinkead v. United States, 150 U. S. 483, 37 L. ed. 1152, 14 S. Ct. 172 (1893); Neilson v. Johnson, 279 U. S. 47, 49 S. Ct. 223, 73 L. ed. 607 (1929). Cook v. United States, 288 U. S. 102, 77 L. ed. 641, 53 S. Ct. 305 (1933). See Miller, *Preparatory Work in the Interpretation of Treaties* (1931-1932) 17 IOWA L. REV. 366; Hyde, *Interpretation of Treaties by the Supreme Court* (1929) 23 AM. J. INT. L. 824-828; Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties* (Feb. 1935) 48 HARV. L. REV. 549, 568-571.

[28]Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666 (1830); Tucher v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 S. Ct. 195 (1902); Charlton v. Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. Ct. 945 (1913); Cook v. United States, 288 U. S. 102, 77 L. ed. 641, 53 S. Ct. 305 (1933).

[29]Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 S. Ct. 525 (1889).

[30]In the case of Society for Propagation of the Gospel v. New Haven, 8

not all treaties are abrogated by war, but it has never decided exactly what kinds of treaties survive war.

In its decisions involving the rights and immunities of foreign states the Court has recognized certain conditions and limitations, in conformity with the doctrine that foreign states are immune from suit without their consent. The early opinion of Chief Justice Marshall in *The Schooner Exchange v. McFadden*[21] was a definite contribution to international law. When Marshall laid down the rule in that case that a public vessel of war of a foreign sovereign was immune from arrest or seizure while in the ports or harbors of another country, he adopted a principle of international comity which has since become almost universally accepted as a rule of international law. Until that time there had been no important judicial decision granting such immunity.

Chief Justice Marshall's process of reasoning in *The Exchange* may shed some light upon the method by which the Court has added to the law of nations. He began by examining the question from the point of view of "logic" and "reason" in order to discover whether, in practice, ships like the *Exchange* should be immune from arrest by the local sovereign, but he looked also to the practical aspects of the problem. Though the ship might have originally belonged to McFadden and was not adjudged a prize by a French court, a foreign sovereign had become possessed of the *res* and had manned and controlled it. For this reason Marshall reached the conclusion that it should not be a subject for adjudication in the courts of another country. Therefore, he laid it down as a rule, which it would seem difficult to refute, that such property was not subject to the jurisdiction of another state. Since then the Supreme Court of the United States and certain foreign courts have extended the rule to all activities of a state.[22] Some writers dislike the extension, yet the original holding in *The Exchange* must be regarded as a distinct contribution. It is suggested that the Supreme Court would have done well to follow Marshall's dictum as to the loss of immunity of a foreign state when it enters into business.

In *The Sapphire*[23] the Court applied the universally accepted principle that a foreign sovereign may prosecute a suit of a civil nature in the courts of another state. In deciding whether the deposition of Napoleon

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Wheat. 464, 5 L. ed. 662 (1823), the actual holding was that property rights vested under a treaty are not altered by a subsequent war between the contracting parties. In Karnuth v. United States, 279 U. S. 231, 73 L. ed. 677, 49 S. Ct. 274 (1929), the Court held that Article 3 of the treaty of 1794 "by its very nature" and in accordance with the intention of the parties was abrogated by the War of 1812.

[21]7 Cranch 116, 3 L. ed. 287 (1812).

[22]See the case of Berizzi Brothers v. S. S. Pesaro, 271 U. S. 562, 70 L. ed. 1088 (1926).

[23]11 Wall. 164, 20 L. ed. 127 (1870).

III would terminate the suit the Court applied another familiar principle of international law; namely, that the sovereignty of a state does not change, but merely the person or persons in whom it resides.

In cases involving the problem of the proper significance to be attached to the acts of revolutionary officers in foreign states the Court has looked to the political branch of the government in order to ascertain the status of the revolutionists.[34] When the acts complained of were performed by persons acting under the authority of a revolutionary government which was later recognized by the United States the Court has applied the doctrine of international law that recognition of a government has a retroactive effect serving to validate all the actions and conduct of the government so recognized, from the commencement of its existence.

Piracy cases before the Supreme Court have been relatively few in number. The first important case on the subject was United States v. Smith,[35] decided in 1820, in which the Court made the statement that both the definition and punishment of piracy depended "not upon the particular provision of any municipal code, but upon the law of nations." Referring to English authorities and cases the Court came to the conclusion that piracy was universally treated as an offense against the law of nations, and that a true definition by that law was robbery, or forcible depredations upon the sea, *animo furandi.*

It is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy. The view now accepted is that piracy is not sufficiently defined by international law so that offenders may be prosecuted by reference to that law alone. Justice Livingston's dissent in *United States v. Smith* pointed out the fallacy in the majority opinion. The view of the Court that any nation may assume jurisdiction over one committing depredations upon the high seas conforms to the accepted international law on piracy.

In some circumstances the Court follows the political departments on points important to its decision. Thus, if a vessel commissioned by an insurgent or revolutionary group is captured as a pirate ship the Court will accept the view of the political departments as to the status of the insurgents.[36]

In its decisions on jurisdiction over criminal acts committed on merchant vessels in territorial waters the Supreme Court apparently admits the merits of the French doctrine of limited criminal jurisdiction of the

[34]Underhill v. Hernandez, 168 U. S. 250, 42 L. ed. 456, 18 S. Ct. 83 (1897); Oetjen v. Central Leather Co., 246 U. S. 297, 62 L. ed. 726 (1918).

[35]5 Wheat. 153, 5 L. ed. 57 (1820). See Lenoir, *Piracy Cases in the Supreme Court* (1934) 25 J. CRIM. L. AND CRIMINOLOGY 532. Cf. Re Piracy Iure Gentium (1934) A. C. 586, cited by Brierly, *loc. cit. supra* note 2, at 32.

[36]See Nelson, J., in United States v. Baker, 5 Blatchf. 6, 12 (1861).

harbor state, but has not accepted it as a rule of law. In *Wildenhus' Case*[37] Chief Justice Waite cited French cases in support of his decision, but this was partly because he was interpreting a treaty embodying the French rule.

For the most part the Court has adhered strictly to the British doctrine of the unlimited jurisdiction of the harbor state over criminal acts committed on foreign ships within its ports. As a principle of law the only exception which would probably be recognized is with respect to foreign war ships, and all nations concur in granting them immunity. Other exceptions are made by the Court when it is bound by a convention which it must apply, or as a matter of comity.

On blockade there have been a number of decisions. Some of these arose out of the Civil War of 1861, others from the war with Mexico and the more recent war with Spain. In these cases the Court elaborated upon the existing doctrine of the international law of blockade, adopting well recognized principles. The first Civil War decisions on blockade, the *Prize Cases* decided in 1863,[38] asserted the following principles: that one belligerent engaging in active war has the right to blockade the ports of another; that neutrals are bound to respect this right; that to justify the establishment of a blockade an actual state of war must exist; that neutrals must have notice of the intention of the belligerent to blockade the hostile port; that a state of war may exist without formal declaration of it by either party; that a civil war exists whenever the regular course of justice is interrupted by a revolt or a rebellion so that the courts can not be kept open; that a proclamation of a blockade by the President is conclusive evidence that a state of war existed; that a vessel in a blockaded port is presumed to have notice as soon as the blockade begins; and that if such a vessel overstays the alloted time it is a proper subject of capture.

In *The Circassian*[39] the general principle was asserted that a vessel sailing from a neutral port with intent to violate a blockade is liable to be captured as prize from the time of sailing, and the intent to violate the blockade is not disproved by evidence of a purpose to call at a neutral port not reached at the time of the capture. This principle was reaffirmed in *The Adula* (1900).[40] In this latter case it was further held that a master, having actual notice of the blockade, is not at liberty to approach the blockaded port for the purpose of making inquiry since such liberty could not fail to lead to attempts to violate the blockade under pretext of making such inquiries. It is improbable that blockade of the Civil

[37] 120 U. S. 1, 30 L. ed. 565, 7 S. Ct. 385 (1887).
[38] 2 Black 635, 17 L. ed. 459.
[39] 2 Wall. 135, 17 L. ed. 796 (1864).
[40] 176 U. S. 361, 44 L. ed. 505, 20 S. Ct. 432.

War type will ever become important again, yet it must be agreed that the decisions of the Supreme Court laid down definite principles and thereby materially added to the law of blockade.[41]

From the foregoing discussion it will be seen that the Supreme Court has not only founded many of its decisions on well accepted principles of international law, but it has also framed and developed principles of its own, generally basing its jurisprudence on foundations for which there was historical justification. It is clear that the Court has definitely added to accepted principles. In so far as this topical study is concerned, the conclusion submitted is that the Supreme Court has enforced international law as it is understood from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. On these particular topics the Court has followed definitely accepted doctrines of law which have gained added weight through repeated assertion and application, by construction has added to the principles, and on occasion has formulated new ones which have later been accepted by jurists and other courts as rules of international law.

[41]Cf. Brierly, *loc. cit. supra* note 2, at 25-26.

THE CONSTITUTION OF THE UNITED STATES

J. Morgan Stevens*

I

Mr. Gladstone, speaking of the American Constitution said:

> "It is the most wonderful work ever struck off at a given time by the brain and purpose of man."

Looking at the result as evidenced by the written document there is much truth in the statement. But it was not the product of accident, or the work of a day or even a year. It was the expression of the moral conscience of generations of sturdy Anglo-Saxon stock, and an expression of the political wisdom of the ages. While the object was to declare and enforce the equal rights of men, pioneer American statesmen had not forgotten the pure Democracy of the ancients. The distinguished framers of the Constitution went back to ancient history and carefully examined the different forms of Republic which had been broken on the rocks of failure, and reviewed modern governments of Europe, and found no model in the old country which suited the peculiar conditions of our Western continent. They attempted to appropriate what was good, and avoided what had been disastrous. Looking back through the stretch of centuries they saw that the path-way of governments lead by the ruined and desolate capitals where once empires stood. Tennyson said that we are the "heirs of all the ages," and certain it is that the Constitution of the United States is merely an embodiment in written form of great principles that were already indelibly written in the hearts and consciences of Christian freemen—immutable and God-given; and an expression of the inalienable rights that are recognized by the "laws of nature and of nature's God." Even the Declaration of Independence was not the beginning of our freedom. When the Pilgrim Fathers landed upon the bleak shores of New England they had charters which guaranteed their liberties, and the Declaration of Independence was an outcry against the violation of rights which the colonies theretofore possessed and demanded. The Constitution, therefore, was not our first effort to set in form a permanent Government for a free people. Ten years before the Constitution was adopted came the Articles of Confederation and the purpose of the convention that framed our Constitution was to amend and build upon the Articles of Confederation. This Convention, which convened in May,

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1787, was not a convention of Revolutionists unfamiliar with the principles of liberty, but a convention of representative statesmen, reflecting the moral consciousness of the ages. They knew that the pure Democracy of the ancients had been a miserable failure. They knew that all the people of the United States could not possibly assemble in one city to express their will, or pass their laws. Of a pure democracy Mr. Mill has tersely stated:

> "The community can only act when asembled, and when assembled it is incapable of acting."

Our statesmen therefore chose a representative form of Government, and divided the powers of government into three co-ordinate branches, the Legislative, the Executive, and the Judicial. Representative government, however faulty, is the only political machinery thus far devised which can serve a populous and widely scattered people. All other forms have led, and would continue to lead, either to chaos and anarchy, or to oppression. This is why Article I, Section 1, of our State Constitution expressly provides:

> "The powers of the Government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit—those which are legislative to one, those which are executive to another."

And Section 2, forbids any person, or collection of persons in one department from exercising "any power properly belonging to either of the others."

What is the fundamental idea in thus dividing our Government? It cannot be denied that the American system of government called for a government of laws more than a government of men. We have a Republic and not a pure Democracy. Under our system representatives of the people are to cast their votes for the public good, and to express the will and conserve the best interest of the whole people. The very object of government is to prescribe and maintain a fixed rule of action designed to promote the welfare of all men. A government without anyone to govern is unthinkable. There must be some permanent scheme and policy, and fixed rules, whereby the conduct of all men is regulated, even though it embraces the majority. In other words, government is based upon laws laying down rules of conduct by which all are bound, high and low, rich and poor. If we have laws there must be a department of government charged with the responsibility of construing and expounding the laws. It is therefore the function of the law-making department, in conformity to the written constitution, to enact our laws. It is the function of the judiciary to expound and declare what the law is. It is the function of the executive department to enforce the laws.

Elbridge Gerry stated on the floor of the Convention:

> "The evils we experience flow from an excess of Democracy. The people do not want virtue but are the dupes of pretended patriots."

Alexander Hamilton, one of the greatest minds who helped think out the scheme of our Government, said:

> "Give all the power to the many, they will oppress the few; give all power to the few, they will oppress the many; both therefore ought to have the power that each may defend itself against the other."

Mr. Madison, another great spirit of the times, said:

> "A pure Democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will in almost every case be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such Democracies have ever been spectacles of turbulence and contention; and have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths. A Republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises a cure for which we are seeking."

It was in the light of this thought, and this experience that the ancient form of direct government was repudiated by the founders of our Republic, and a representative form of government, divided into three co-ordinate branches, substituted. Mr. Bryce says:

> "The constitution is the conscience of the people who have resolved to restrain themselves from hasty or unjust action . . . The constitution is the haven of the minority who when threatened by the impassioned vehemence of the majority can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."

How important therefore it is to keep our departments of government entirely separate, and how important, therefore, is the judiciary in maintaining the integrity of the Constitution.

De Tocqueville said:

"The power vested in the American Courts of justice to declare a statute unconstitutional forms one of the most powerful barriers that has ever been devised against the tyranny of political assemblers."

Senator Borah, on the floor of the United States Senate said:

"Though the majority must rule, yet a government which has no method for protecting the rights of the minority is a despotic government, I do not care whether you call it a monarchy, and aristocracy, or a republic."

The late Chief Justice Taft observed:

"A popular government is not a government of, by and for the majority. It is a government of the whole people under such rules and checks as will secure a wise, just and munificient government for all the people . . . Reform cannot be accomplished by abolishing the requirements which the experience of ages has shown to be of necessity."

As remarked by Mr. Hamilton:

"The complete independence of the judiciary is peculiarly essential in a limited constitution."

Hence it is that the Constitution of the United States embodies the following fundamental principles:

First, it is a representative government, or a Republic, and not a pure Democracy.

Second, the powers of government are divided into three co-ordinate branches, legislative, executive and judicial.

Third, the government of the United States is a union of sovereign states in which the citizen has a dual allegiance, both to the state and to the United States.

Fourth, it provides for an independent judiciary that has nothing to do with the making of laws, but the large responsibility of expounding and pronouncing the law.

Fifth, the Constitution recognizes the individual citizen as the corner stone of our political structure, and guarantees his inalienable rights to life, liberty and the pursuit of happiness.

II

The thoughtful and devout citizen believes and maintains that the Constitution was divinely inspired. While our Pilgrim Fathers were yet upon ship they entered into a written compact which began as follows:

> "In the name of God, Amen.
> And having undertaken for the glory of God, and the advancement of the Christian faith," etc.

Columbus was inspired by a desire to spread the gospel to the uttermost parts of the earth, and his expedition began and ended in prayer. The first act of the Pilgrim Fathers upon landing was to raise the cross and bow the knee. Their next act was to erect a church and a schoolhouse. The very object of their migration to the new continent was to find and exercise religious freedom. The Declaration of Independence proclaimed:

> "We, therefore, representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by authority of the good people of these colonies, solemnly publish and declare," etc.

The constitutional Convention was composed of fifty-five great statesmen, animated by no other purpose than to do right. General Washington, the father of his country, said, at the opening of the Convention:

> "If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and honest can resort. The event is in the hand of God."

After the Convention had labored four weeks and accomplished nothing, Benjamin Franklin rose, and addressing George Washington, the chairman, among other things said:

> "I have lived, sir, a long time, and the longer I live the more convincing proof I see of this truth, that God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings that 'except the Lord build the house they labor in vain that build it.' I firmly believe this; and I also believe that without His concurring aid we shall succeed in this political building no better than the builders of Babel; we shall be divided by our little, partial, local interests; our projects will be confounded and we ourselves shall become a reproach and a by-word down to future ages . . . I therefore beg leave to move, 'That hereafter prayer, imploring the assistance of Heaven, and its blessings on our deliberations, to be held in this assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.'"

It is for this reason, believing that the integrity of our Constitution is threatened by insidious attacks from various quarters that the American Bar Association, several years ago, appointed a committee on American Citizenship, charged with the responsibility, and adopting as their shibboleth their purpose, "to re-establish the Constitution of the United States and the principles and ideals of our Government in the minds and hearts of the people." To this end the American Bar planned a nation-wide observance of Constitution Week, and called upon the Protestant ministers of the United States to preach from the common text—"Remove not the ancient landmark which their fathers have set." If, therefore, we believe in this text, and the principles and guaranties of our sacred Constitution, not only lawyers but laymen should become messengers of the principles of our Government, and we should make it our duty on proper occasions to preach, especially to the youth of our land, upon our glorious heritage. We should be reminded that neither a Cato nor a Cicero, nor any great man of ancient times, conceived of a government like ours. We should be reminded that our liberties are bought with a price . . . the blood of patriots and the sacrificial tears of devout women.

III

Its Provisions

The original draft of the constitution contains only seven articles which can be written upon approximately two typewritten pages. It is a model, therefore, for simplicity and brevity. It is to be remembered, however, that its framers appreciated the fact, and tacitly understood that further amendments would be drawn, guaranteeing the rights of individuals and more definitely defining national and state powers. The first ten amendments, commonly known as our Bill of Rights, were drawn by the first Congress under the new Constitution, submitted for adoption and were promptly adopted by the several states. These amendments are significant and far-reaching, but after all are declaratory of inalienable rights partially reflected by the Magna Carta and the English Bill of Rights. But they go further and give guaranties not before expressed in the organic law of any nation. It is distinctly an advance in the struggle for freedom, and the rights of the individual. This is particularly true in regard to the first amendment, providing:

> "The courts shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press; or the right of the people peaceable to assemble and to petition the Government for a redress of grievances."

This was a departure from former precedents. The Bill of Rights furthermore grants the individual the right to bear arms for the defense of the State; the protection of the individual and his home, both in war and in peace, against the military authorities; security against unreasonable search of persons, homes or possessions without a search warrant; the requirement of an indictment by a grand jury for a capital or infamous crime; a provision that no one charged with crime shall be compelled to be a witness against himself; a provision that the individual shall not be deprived of life, liberty or property without due process of law; a prohibition against the taking of private property for public use without just compensation; the right of a speedy and public trial by an impartial jury in criminal cases; a prohibition against excessive fines, and cruel and unusual punishment; and a provision that the powers not expressly given to the Federal government shall be considered reserved to the states.

Thousands and thousands of amendments have been proposed, but few adopted. Each speaks for itself and marks the onward march of progress.

Our Constitution permits no Royalty or Aristocracy

We must place ourselves in the position of the illustrious framers of the Constitution, who were thoroughly advised as to the weaknesses of kings and a landed aristocracy, and the evils of a monarchial form of government. Jefferson, who was abroad on a mission for his country at the time the original constitution was adopted, nevertheless had a hand in the preparation of the amendments which protected the rights of the individual. In one of his private letters Jefferson remarked that he had read of many kings, and had personally known many, and in his judgment all of them were either crazy or degenerates. Two hundred and fifty years before the Declaration of Independence, ruled Henry VIII, that king who first and last had six wives, two of whom were divorced, and two met violent death, instigated by him. It was he who wanted to get rid of his wife, Catherine of Aragon, and notwithstanding the fact that he was a good Catholic, and termed "Defender of the Faith," his petition to the Pope for the privilege of divorcing Catherine was denied. It was then that the king had one of his own judges pronounce his marriage to Catherine void, and married Ann Boleyn. When he desired to contract another marriage to Jane Seymour he sent the mother of his new-born babe to the block, and got rid of her by having her head chopped off. It is no wonder therefore that our Constitution makers were impatient with the escapades and oppressions of kings. The Constitution of the United States makes of the citizen an uncrowned king, and guarantees

to him every legitimate chance for success. It is interesting to reflect that crowns have been crumbling, and that royalty, with its oppressions, is getting to be a thing of the venerable past.

Bills of Attainder

Our Constitution provides that no bill of attainder shall be passed by the National Government. There was a time when an English king, by his decree, or by act of Parliament, forced all subjects to acknowledge the religious faith to which he subscribed. All subjects were expected to be Catholic if ruled by a Catholic King, and Protestant if the sovereign was Protestant. If an individual incurred the displeasure of the crown a bill of attainder might be passed authorizing confiscation of his property and condemning the individual to death without trial, and without the judgment of any court whatsoever. The individual forfeited his life merely because he entertained opinions at variance with the opinions of the king. It is stated that 72,000 persons suffered capital punishment during the reign of Henry VIII, when the English population amounted to only three million. This dark page of history furnished the background, and the reason for the provision in our National Constitution against bills of attainder.

Religious Freedom

The same causes which lead to the provision against bills of attainder lead to a provision guaranteeing the right of every individual to worship God according to the dictates of his own conscience. The Pilgrim Fathers themselves came in search of religious freedom. When Henry VIII turned against the church of Rome because of the Pope's refusal to grant his divorce from Catherine, he set himself up as the supreme head of the church, and began cruelly to persecute all who did not conform to his mode of worship. The penalty for professing, preaching or practicing a different religion was not only imprisonment, but certain death, and death not merely by the axe but by burning at the stake. Henry VII and his son, Edward VI, persecuted the Catholics. Edward's daughter, Bloody Mary, persecuted the Protestants. Elizabeth, Henry's daughter by Anne Boleyn, persecuted the Catholics. It was during the reign of Bloody Mary that the two Bishops, Ridley and Lattimer, were burned at the stake, and the prophetic and immortal words of Lattimer were uttered as he addressed his brother martyr, Ridley—

> "Be of good comfort, Master Ridley, and play the man, and we shall this day light such a candle by God's grace, as shall never be put out."

It was under the light of this candle that the Pilgrim Fathers landed upon the bleak shores of New England, and erected their log meeting house. It was by the light of that candle that the Declaration of Independence, and the Constitution of the United States were written. It is this light which illumines the minds and consciences of multiplied thousands today.

Cruel and Unusual Punishment

Our Constitution forbids cruel and unusual punishment. The history of the English people is a history of cruelty and barbarism. Even after the Constitution of the United States was in full force in America, Lord Ellenborough, Chief Justice of England from 1802 to 1818, often pronounced the well-known but cruel judgment commonly referred to as "hanged, drawn and quartered." The death penalty was announced as follows:

> "You are to be drawn on hurdles to the place of condemnation; where you are to be hanged, but not until you are dead; for while you are still living your body is to be taken down, your bowels torn out and burned before your face; your head is to be then cut off and your body divided into four quarters."

We have only to read this cruel and barbarous language from a court supposed to be a court of justice, to appreciate our Constitutional provision against cruel and unusual punishment. Let the individual be reminded of this and his patriotism for our great nation will at once be stimulated.

Security of Life, Liberty and Property

Every individual in America, no matter how humble, is protected in his life, liberty and pursuit of happiness, and in all of his property rights. It is the Constitution which gives him the right to the ownership and protection of his home. The Constitution not only protects the wage earner in his earnings, but the successful business man in his property rights. No distinction can be made between the rich and the poor, the high and the low. All men have equal opportunities—opportunities never before so freely possessed by the rank and file, the great masses of the people. It is here that the Constitution protects the minority as well as the majority, the individual as well as the Government. This provision is our bulwark and protection against Socialism, which has for its object a denial to each individual to own and hold what lawfully belongs to him, and which in theory would distribute equally the fruits of all men's labor, and place a premium upon idleness and ignorance.

An Independent Judiciary

Our Federal Constitution provides for an independent judiciary. The very success of our government depends upon the existence of a supreme tribunal which can not be tossed about by the winds of politics, or unduly influenced by political bias or prejudice; a tribunal with power to interpret and declare what the Constitutional provisions mean. It was necessary to have the Supreme Court of the United States to declare and confine Federal authority to its legitimate field, and state the limits of State aggression on Federal domain. The history of the United States is largely a history of the Supreme Court of the United States. Time forbids any elaborate treatment of this subject. The whole subject has been recently dealt with by Mr. Charles Warren in a much-praised three volume book "The Supreme Court in United States History." This book should be read, not only by every lawyer in the United States, but by the intelligent layman.

William Tudor wrote, in the North American Review, in 1816—

> "Whenever any set of men shall entertain designs against the Constitution, either to overwhelm it in the anarchy of simple democracy, or to found on its ruins a usurpation of monarchical power, they will commence their operations by open or insidious attacks to weaken and overthrow the Judiciary."

The right of the court to pass upon the constitutionality of acts of Congress and State Legislatures is one of the cherished provisions of our Constitution. It is said of the opinion of Chief Justice Marshall, in *Cohens v. Virginia* (6 Wheat. 265, 5 L. Ed. 257):

> "It was one of the strongest and most enduring strands of that mighty cable woven by him to hold the American people together as a united and imperishable nation."

A toast given at a dinner party in Washington in 1801, was as follows:

> "To the judiciary of the United States—independent of party, independent of power, and independent of popularity."

The judiciary stands as an impartial arbiter between the executive and legislative departments of government, and without the power to declare a statute unconstitutional our whole American system of dividing government into three co-ordinate branches would be completely undermined and destroyed. The hope of the Nation, as well as the rights of the individual, depends upon an independent judiciary. So far as the judges of the Supreme Court of the United States are concerned, they have uniformly been true to the great trust committed to them. As said by Mr. Warren:

"Judges appointed by Jefferson and Madison did not hesitate to join with Marshall in sustaining and developing the strongly Nationalistic interpretation of the Constitution so obnoxious to Jefferson. Judges appointed by Jackson joined with Marshall and Story in supporting the Cherokee Missionaries against Georgia, in flat opposition to Jackson. The whole Bench appointed by Jackson decided against his policy in relation to the Spanish land claims. Judges appointed by Jackson and Van Buren threw down the gauntlet to the former by issuing a mandamus against his favorite Postmaster-General. In every case involving slavery, anti-slavery Judges joined with pro-slavery Judges in rendering the decisions. The constitutionality of the obnoxious Fugitive Slave Law was unanimously upheld by anti-slavery Whig Judges and by pro-slavery Democrats alike. A Northern Democrat joined with a Northern Whig Judge in dissenting in the *Dred Scott Case*. President Lincoln's Legal Tender policy was held unconstitutional by his own appointees. The Reconstruction policies and acts of the Republican Party were held unconstitutional by a Republican Bench."

As well stated by Mr. Warren:

"It has been through the exercise of this power to pass upon the validity of State statutes, under the Judiciary Act, that the Court has largely controlled and directed the course of the economic and social development of the United States. It is difficult to imagine what the history of the country would have been if there had been no *Dartmouth College Case* on the security of corporate charters; no *McCulloch v. Maryland* on the right of a State to tax a National agency; no *Gibbons v. Ogden* on interstate commerce; no *Brown v. Maryland* or *Passenger Cases* on foreign commerce; no *Craig v. Missouri* on State bills of credit; no *Charles River Bridge Case* on State powers over corporations; no *Slaughterhouse Cases* on the scope of the Fourteenth Amendment."

IV

Present Trends

It is said on good authority that there are countless numbers of radicals in this country who do not approve of our form of government, and who are opposed to the constituted authorities. The very constitutional right of the freedom of the press protects many newspapers in advocating unamerican views. We have just been through an over-shadowing economic depression that fosters social and political unrest. Shall

the charter of our liberties be torn in shreds by unholy hands? Was the Constitution ordained to bridge pioneers of America over a page of history? What higher motives and objects could be expressed than that set forth in the preamble, that is:

> "In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The high purposes thus expressed have been gradually realized. New emergencies and new relations naturally require new application of constitutional principles, and thus it is that mighty conflicts are being waged at present, as evidenced by many court decisions of recent date. It is not permissible here to enter the wilderness of current decisions on the Constitution or constitutional questions growing out of state legislation. Primitive methods of transportation and communication have given way to those modern methods which as it were, make the world one parish. The breakdown of our economic and banking systems and to a large extent the breakdown of society itself, causes the thoughtful student to wonder whether government itself will break down. In this more or less economic struggle, important court decisions challenge the interest of both lawyer and layman. The Minnesota Moratorium decision has naturally been the subject of much discussion. Both the majority and minority opinion recognize that the law is progressive and expansive and must adapt itself to new relations and interests which are constantly springing up in the progress of society, as was so well said by Chief Justice Green of Rhode Island and copied on the fly leaf of Corpus Juris.

In the case just referred to, Mr. Chief Justice Hughes well stated, that while an emergency does not create power, it may yet furnish the occasion for the exercise of a power. And, Mr. Justice Sutherland in the minority opinion, likewise well stated, that the provisions of the Federal Constitution are pliable to the extent that in appropriate cases there is brought within their grasp, every new condition that falls within their meaning.

Both of these distinguished judges had in mind the observations of the court in the Milligan case, where the court in language which should ring down the centuries observed that: "The constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances," and that its provisions should not be suspended, "during any of the great exigencies of government."

Likewise in the Nebbia case, state authority to regulate the price of milk was upheld on a close vote, and on what many thoughtful lawyers

consider doubtful grounds. In other words, not only the law student but the trained lawyer is having difficulty in reconciling some of the pronouncements of the highest court in the world with previous decisions. Here we have the Supreme Court of the United States expressly declaring that a state is free to experiment with an economic policy and to adopt whatever economic policy may be reasonably deemed to promote public welfare, and expressly declaring that the phrase which had been so freely quoted in prior decisions, "affected with the public interest" now means no more than that an industry for adequate reason is subject to control for the public good. When we lay the majority decision side by side with previous declarations of the same court, that "it has never been supposed since the adoption of the Constitution, that the business of the butcher, the baker, the tailor, the woodchopper, the mining operator, was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation," then the lawyer finds it difficult to reconcile even the pronouncements of the Supreme Court of the United States. Many of us are forced to the conclusion that the views of the court are undergoing some change, and that the court itself in the Nebbia case is entering upon, an uncharted sea. In final analysis the court in effect makes the law as much as the legislature. The law is what the court ultimately declares it to be. Therefore, the Constitution of the United States becomes what the court declares it to be.

Legal battles are being waged with reference to the National Emergency Legislation, and many challenging decisions involving constitutional questions should be the subject of serious thought and study. In the midst of it all, we still pin our faith in the Supreme Court of the United States. It is our duty, however, as good citizens to help form and express public opinion, to inform ourselves in reference to the Constitution and constitutional decisions, and to rally afresh around the standard of our country as "Minute Men of the Constitution" and cooperate in a cheerful way in supporting all officers in any wise charged with the duty of administering or enforcing the law, and to defend, even with our lives, if need be, the Constitution of the United States.

A RE-EXAMINATION OF OUR LEGAL RIGHTS*

WEX S. MALONE**

In previous installments I have sought to approach the subject of legal rights from two separate angles. I began with the analytical approach, the approach of the mathematician or abstract philosopher. I believe that I succeeded in demonstrating the limitations of this point of view. To study an object with the eye of logic we must first isolate it from all disturbing outside factors and confine ourselves to what is given. That is to say, if our major premise admits only X and Y we can not deduce a result in terms of Z. Now this exclusiveness of the approach of logic marks its weakness when applied to practical legal philosophy, for no social institution such as the law can be adequately understood when divorced from the society of men in which it operates. Pure abstract law existing in a wholly isolated state is a mere myth. Nevertheless we did find that logic has played its part in the development of our legal system, and that part has been a large one. It has succeeded in making the materials of the law plastic and accessible. It integrates the heterogeneous digits of the legal scheme into composite polygonal numbers that are submissive to the ordering manipulations of the mind. With its help we see likes as likes and dislikes as dislikes. Logic can not give us the materials of the law, but it can aid us in making a more fluent use of those materials we already have.

In our search we turned from the logician to the historian. Following the method of the latter we began to trace the historical development of law and its relation to the growing social order. For convenience we cleaved the line of the law's development into segments or periods of growth. This is typical of the historical method, to formulate epochs which appear to the historian to mark the ascendency of particular specialties of his subject. Yet any such division must of necessity be arbitrary. For example, the legal institution has contained at all times in its history the germs of those features which at one time or another became sufficiently prominent to characterize definite *eras* of the law's growth. We found a period of *strict law,* yet the law has never been wholly without its strictness. We believe today that we are entering a period of socialization of the law, but the law has never been entirely unmindful

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*This is the third of a series of articles on this subject. For the preceding installments see 7 MISSISSIPPI LAW JOURNAL 149 and 260.

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of social interests. In other words, the most we can say without risk of contradiction is that certain characteristics of the legal structure have at various times achieved prominence, have been specially emphasized in the minds of jurists and lawyers. Never is there an abrupt ending of one epoch or era and the concurrent beginning of its successor; rather there is a slow decline of one characteristic and a corresponding ascendency of another. We can't lay our finger on the precise moment when the old order is subordinated to the new. Always there is the twilight zone.

What has been said above applies particularly to the period of equity or natural law we are about to discuss. There was never a time in the history of the law when the germs of morality were wholly absent. What we do find is that in the early stages of legal development there was a predominant interest in a uniform law whose tenets should be preserved secure by means of dogma and formalism. The result was a subordination of moral ends. In their effort to maintain certainty and to secure a predictable result the mechanical attributes of the law succeeded in choking out any adequate expression of the ethical interests of the community. But they did not entirely exclude morality from the legal equation. Had there been no recognition of ethics in the early law there would have been no expansion of the legal compass, no change in the content of the legal form. Only the continuous pressure of new and vital moral interests and their constant but unwilling admission into the legal scheme preserved the law from stagnation in its very inception.

In like manner when we refer to the period of equity we indicate only a shifting of emphasis from the formal to the ethical aspect of the law. There never was and never can be a system of positive law which fully expresses the prevalent moral norms of the time, just as there can not be a system of law which so completely fulfills the demands of mechanics and formalism that morality is completely ignored.

Legal writers place the period of equity in the Seventeenth and Eighteenth Centuries.[1] But the Court of Chancery was enforcing uses on land shortly after 1400,[2] and even prior to this time bills were allowed for the recovery of property procured through fraud,[3] and for the return of the consideration for a promise which the defendant refuses to perform.[4] As a matter of fact the period of equity began long after the emergence of the Court of Chancery. It appears to the writer that the term when properly used marks the general acceptance by the legal pro-

[1]For example, see, Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 213.

[2]Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 265, footnote 2.

[3]Brampton v. Seymour (1386) 10 Seldon Society Collection of Cases in Chancery No. 2.

[4]Bernard v. Tamworth, 10 Seldon Society Collection of Cases in Chancery No. 56.

fession of the equitable attitude or approach and the disregard of formalism in the solution of legal controversies, current in the Seventeenth and Eighteenth Centuries.

The distinguishing character of the court of Equity lies in its direct concern with the conscience of the defendant. Has he performed his moral duty? This is the inquiry. It is not enough that he has done all the law requires of him, nor that he has infringed no legal right. The operation of equity is on the defendant himself. It is *in personam.* As we have already seen, rights and duties when seen from the strictly legal viewpoint are not in truth rights and duties of human beings, but are incidents of the pattern of the law itself. They centralize around the individual only because he is a legal person, is himself an entity of the law. At common law men are simply the termini of legal relations, and once the relationship is assumed its incidental rights and duties follow as a matter of course.

On the other hand equity does not assume the legal precept. It does not even accept it until it has met the test of conscience. It is not enough for the Chancellor that one is vested with all the rights and duties incident to legal title. He must be entitled in good conscience to retain these incidents before he has a standing in equity. Under such a view the legal right is not self-sufficient. It can obtain only in so far as it is commensurate with the ulterior standard of morality. In other words, the subjective personal precedents of the jurist's mind have gained precedence over the objective traditional materials of the common law.

The equitable idea became triumphant early in the Seventeenth Century when as a result of his famous controversy with Lord Coke, Lord Ellesmere succeeded in establishing the power of Chancery to restrain the enforcement of a common law judgment procured through fraud.[8] The ensuing period marked the firm establishment and the subsequent broadening of the scope of all those incidents of the jurisdiction of Chancery so common today.

The Equitable approach was by no means confined to the deliberations of the Court of Chancery, but became current in the courts of common law as well. It must be apparent that no organic change in a single portion of the juridicial system can long remain local in effect, for legal thought tends to proceed as a unit. Always there is a constant levelling process at work in the law. The influence of a novel decision on the legal structure is not exhausted when the case is established as a potential precedent for indentical or analogous situations in the future. A revolu-

[8]For a full account of this contest and the decision of James I which terminated the argument in favor of the jurisdiction of equity, see, 1 LORD CAMPBELL'S, LIVES OF THE CHANCELLORS, 235.

tionary decision likewise generates principle. It is the vortex of a new current of thought which permeates the attitude of lawyers and judges. In this way it transcends the limits of analogy and even over-leaps the confines of any particular court system, becoming, so to speak, current legal coin.

The most prominent example of the equitable approach at law is furnished in the evolution of the doctrine of quasi contract, or, as it is sometimes called, the action for money had and received. This doctrine had its origin in Lord Mansfield's decision in the case of *Moses v. Macferlan.*[6] Moses had endorsed notes of one Jacob to Macferlan upon the latter's agreement that Moses should not be sued thereon. However, Macferlan brought suit contrary to his promise, and the court being of opinion that an agreement not to sue was not a defense at law had given judgment against Moses on his endorsement. After paying the judgment Moses sued Macferlan in indebitatus assumpsit to recover the payment. The objection was raised that indebitatus assumpsit could not lie since the case was neither one of a genuine promise nor one adaptable to the action of debt.[7] However, by this time the moral or equitable attitude had already infiltrated the legal system sufficiently to disorganize the arbitrary formalities of remedies on conrtact. Lord Mansfield, one of the most enlightened jurists of all times, was always anxious to further impregnate the law with equitable principles and in a monumental decision dismissed Macferlan's objection:

> "If the defendant be under an obligation from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu,* as the Roman law expresses it) . . . This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and

[6]2 Burr. 1005 (1760).

[7]To understand this contention, which under the then existing authorities was unanswerable, it must be remembered that debt was the appropriate form of action at early common law to recover on a promise to pay money. The action of assumpsit was applicable only to promises for which debt would not lie. Frequent attempts were made by obligees to use assumpsit for promises within the scope of debt since the archaic wager of law (see installment II of this article) was a defense in the latter action. Eventually it was held that where one was under an obligation to pay money enforceable under the action of debt and subsequently made an express promise to pay the same this later promise was enforceable in an action of assumpsit [Manwood v. Bruston, (1588) 2 Leo. 203, 204]. However, this extension did not adequately make the desired substitute available, since a second express promise to pay money already owed was required. Finally in Slade's Case (1602), 4 Coke, 92, b, the court held that an independent subsequent promise would be implied in law in every case where debt was applicable. Thus assumpsit (called indebitatus assumpsit under such circumstances) became a concurrent remedy with debt for the enforcement of promises to pay money. In the present case it is clear that an action of debt would not lie to recover the money paid in satisfaction of a judgment, hence the prerequisite condition to an action for indebitatus assumpsit was lacking.

> therefore much encouraged. It lies only for money which, *ex aequo et bono,* the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law—as in payment of a debt barred by the statute of limitations or contracted during his infancy, or to the extent of principal and interest upon a usurious contract, or for money fairly lost at play, because in all these cases the defendant may retain it with a safe conscience, although by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

There are several noteworthy features in this decision, features which epitomize the equitable attitude. In the first place, we observe a disruption of the logical continuity of the action of assumpsit, a disregard for the formal requirements of the then established law. Even though there be no facts cognizable under the action of debt it is enough that a *moral* debt exists. Second, the emphasis on the ethical state of the defendant's conscience is in keeping with the ideas already seen as characteristic of equity or natural law. Here again the moral duty is the legal duty, the moral right the legal right. Third, each case must stand or fall on its own particular facts. Legal rules and materials are subordinated to the moral and extra-legal precedents of the jurist, and uniformity of result must yield to the ethics of the concrete case.

The moral principle behind the quasi contract is that unjust enrichment should be prevented. The same principle is the underlying basis of the imposition of constructive trusts in equity. Both the quasi contract and the constructive trust are anomalies in legal terminology. In neither instance do we find true counterparts in the trust or the contract, for the latter are both the result of consensual agreement between willing parties. On the other hand constructive trusts and quasi contracts are paramount or irrecusable. That is to say, the law having determined to remedy an unconscionable situation, seeks some juristic name for the moral duty imposed on the defendant, and makes the unwilling defendant a contractor or trustee irrespective of his consent.

One cannot review the decisions handed down by the King's Bench during the Eighteenth Century without pausing to admire the sagacity of Lord Mansfield, the Chief Justice of that court from 1756 till 1788. In his decisions is summed up the full force of the ethical drive of the

period. Being Scotch by extraction and better versed than his predecessors in the Civil law he was able to transcend many of the legal limitations of his time. His genuine learning and great ability together with his magnetic personality enabled him to effect the unification of law and morals more completely than any jurist before him and probably any since his time.

The doctrine of good morals extended into the law further than merely to prevent unjust enrichment. Although its influence was felt throughout the entire legal structure it was particularly exerted in the field of contract. The reason for its peculiar applicability here is not hard to find. In the first place we have seen that the law of contract was the most recently developed field of legal activity. It had only recently passed from the property aspect to the consensual or promissory stage.[8] Its growing bud had successfully burst the formal casements of covenant and debt and was pressing the outermost limits of assumpsit. Its formalistic background was nothing like as imposing as that of property or tort but was rather a field that had been plowed and turned under before. For this reason new innovations were accepted with more complacency here than elsewhere. In the second place it was in the field of contract that new interests were most insistently pressing for legal recognition. The Eighteenth Century marked a period in English history of increasing economic activity and expanding commerce. The Industrial Revolution together with colonial expansion created an urgent demand for fluent commercial devices, a demand for the utmost security in transactions. All agreements made in the run of the trade and executed with a minimum of formality must be enforceable in the courts if the channels of commerce were not to be clogged. This was the exhortation of the newly created mercantile class. The result was that honesty in transactions became paramount over the form in which they were couched.[9]

We have already seen that a promise as such was slow in gaining legal recognition. It finally came into the law through the action on the case for deceit, and carries even today many of the incidents peculiar to this form of action. In order for one to recover for a deceit he must have parted with something of legal value in reliance on the lie for which he seeks compensation. The requirement of consideration in contracts

[8]See, F. B. Ames, *History of the Action of Assumpsit,* 2 HARV. L. REV. 1, 53.

[9]Another concession of law to the demands of commerce is found in the history of negotiable instruments. The absorption of the Law Merchant into the common law occupied a period covering both the Seventeenth and Eighteenth Centuries. A discussion of this absorbing phase of legal history is beyond the scope of the present article. The reader is referred to the excellent treatment in 2 STREET, FOUNDATIONS OF LEGAL LIABILITY, Part III, Chapters 31 through 45. Suffice it to say that here again the equitable approach expressed itself, but in a novel form. We find an insistence that the law should conform not only to the ethical demands of civilization but to its social and economical needs as well.

is an outgrowth of this doctrine.[10] If consideration carried with it something of the idea of equivalents in bargaining it might be defended on equitable principles, but it does not. A tomtit or a peppercorn is adequate legal consideration for any promise, and the law is not concerned with the unfairness of a foolish man's bargain. The result is that consideration is a purely mechanical bit of legalism. Every lawyer knows that any promise can be so framed as to conform with the law's requirements in this respect. Yet it persists in the law through juristic inertia. When the doctrine of consideration is seen in this light is there any wonder that its ouster was attempted during the period of equity to which we have referred? The ethical idea is that a promise is a word of honor, a moral pledge, and for this reason alone it should be enforceable at law unattended by the hocus pocus of consideration. Thus Lord Mansfield held that a bill of exchange or other written promise is good at law without more ado.[11] In another case he ruled that a promise to pay a debt barred by the statute of limitations or the statute of frauds is binding *per se*.[12] Although the doctrine of these decisions was later nullified[13] they nevertheless presaged the growing dissatisfaction with the technical requirements of consideration prevalent today among lawyers and judges.

What happens to a system of law when it becomes thoroughly innoculated with moral principles? In the first place it takes a new and more favorable attitude towards the individual. Its operation tends to become *in personam*, to directly effect the conscience of the person concerned. Under such a view all moral persons are absorbed into the concept of legal personality, being no longer regarded as mere parties to some legal relationship. Instead of the individual obtaining at law solely for the sake of the legal precept we find the latter existing for the purpose of protecting the individual as a moral person. It is important for our purposes to bear in mind that equity makes the individual the focal point of the law, and since all persons have moral capacities equally they become equally entitled to legal protection.[14] In brief, the idea of equality of persons becomes an underlying tenet of the law.

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[10]Ames, *History of Assumpsit, supra* note 8.

[11]Pillans v. Van Mierop (1765) 3 Burr. 1663.

[12]Hawkes v. Saunders (1782) 1 Cowp. 289. Here again the language of the decision is clearly indicative of the times:

> "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration . . ."

[13]The doctrines of Pillans v. Van Mierop was repudiated by the House of Lords, Rann v. Hughes (1778) 7 T. R. 346. Hawkes v. Saunders, however, persisted in the law in one form or another until 1840. See Lee v. Muggeridge (1813) 5 Taunt. 46. It was finally overruled in Eastwood v. Kenyon (1840) II Ad. and El. 438.

[14]This idea underlies the doctrine "Equality is Equity."

A second result of the equitable attitude is found in the tendency of the court to talk emphatically in terms of right and duty. It is true that we heard of legal duties long before the first innovations of equity appear, but such a concept implied no moral sense of "oughtness." It was, as we have seen, no more than a generalized description of the law's remedies. But with equity comes the idea of ethical fitness, and we find the court testing a legal relationship in terms of its right or wrong moral consequences. Thus there is most certain to arise an idea of "right" to which the law is subservient. Let us now combine this idea of a right with the tendency of the law to centralize around the moral individual and the result is apparent; we have the germinal basis for the outstanding legal ideal of the Nineteenth Century, *rights of the individual, equality of men before the law,* and *equality of rights.*

So long as the courts continued to progress toward an identification of law and morals there was little emphasis on the idea of right as an adjunct of the individual. The chancellor was interested in rightness of result rather than rights as possessed by persons. In fact even today we seldom refer to an equitable right. It is always duty which occupies the chancellor's attention, duty imposed on the defendant's conscience.

The equitable or moral attitude of courts likewise resulted in a broadening of the scope of legal operation, in an assimilation of new interests into the law. The implication here is that the law was active and vigilant. It was regarded as a beneficial institution working for the amelioration of humanity and as such was responsive to conscious directive effort. This idea was later to disappear with the decadence of equity.

There is one decidedly pernicious feature to every true moral law, namely the incertitude of its decisions. We can not lend, borrow, buy or sell unless the legal consequences of our proposed transaction are definitely ascertainable in advance. We must have definite rules upon which to predicate our activity, and it is not enough to know that a just and moral decision based on the merits of the particular circumstances will be forthcoming. Commerce demands a law that is predictable even though it merely approximates morality. It is just this certainty of result that a really ethical law cannot supply, for the fine gradations of human conduct escape all categories. It must proceed through principle rather than rule.

However, the above characteristic tends to correct itself, and in its correction we find the cause of the decadence of equity and the birth of that period in legal history known as the period of codification. How did this come about? It is not difficult to understand if we bear in mind that the tendency of all human thought is toward simplicity and system. It is a common belief that mental effort can not be constructive unless

each thought is carefully pigeon-holed away and classified according to some pre-conceived scheme or notion. For this reason, as equity was developed it was developed as a system; it was doctrinized. By this time it must be obvious to my reader that such a process is one of crystallization, and indicates a yearning back toward the period of strict law. Once an ethical idea becomes solidified into a precept it is in great danger of losing its significance. Often enough the form persists long after the moral content is gone. It is perpetuated as a rule of thumb. The idea has become, not conformity to morals, but conformity to the established principle, rule, dogma, or what have you. The result is that equity as an ideal is gone. Its liberalizing force is spent. Instead we have two systems of law, one of which is merely more enlightened than the other since it was formulated in more enlightened times.[15]

Let us turn back for a moment to the ideal of equality of individual rights that we found engendered during the period of equity. This ideal reached its fruition in the Nineteenth Century. Although the moral urge had dissipated itself, nevertheless its form of expression, once put into current usage remained there. As a result the term, *equality of rights* took on a new significance. It will be remembered than in an earlier installment of this article it was pointed out that the early common law actions were continually changed in breadth and scope as they were enlarged and even distorted to make way for new interests seeking legal recognition. We find the same idea again in the Nineteenth Century, but its manifestation is more subtle and obstruse. In both instances an old shell was being filled with new material. First it was the shell of a form of action; later it was the shell of an ethical concept, the word "right," whose original meaning had been exhausted with the subordination of moral law.

The salient characteristic of the nineteenth century law is its insistence on equality of rights, and security. The equitable idea of equality has become thoroughly tempered by the imposition of uniformity and certainty of remedy, characteristics of the earlier strict law. Security means primarily security of property and contract. These latter are couched in terms of *right*, but how different is the idea! Once the *right* is given, its enforcement follows irrespective of moral or social consequences.

Frequent cases witness the court's sanction of the immoral and even malicious exercise of rights. The owner of property sinks a well thereon, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring. For many years this was regarded by certain respectable courts as outside the pale of legal interference. The owner had a property *right* in his land and a *right* to use it as he saw fit.[16]

[15]Pound, *The Decadence of Equity*, 5 COL. L. REV. 20.

[16]Mayor v. Pickles (1895) A. C. 587. In this country the opposite rule prevailed in most courts. But, *contra*, Chatfield v. Wilson, 28 Vt. 49; Huber v. Merkel, 117 Wis. 355.

Likewise a property owner has been repeatedly held privileged to erect a tall and unsightly fence near the boundary of his land for the purpose of annoying his neighbor or depreciating the value of his property.[17] Nor was there any objection to the setting up of billboards in a residential district irrespective of their effect on the value of surrounding property so long as they were not a menace to physical safety.[18]

Under such a scheme of law the individual becomes paramount over the legal scheme. He acquires rights against the law as well as in it. No longer do we have the active vigilant legal machines of the period of equity. Instead the purpose of the law has become to function as little as possible, to refrain from interference with individual liberty. The following is quoted from Jeremy Bentham's *Principles of Legislation,* which fairly epitomizes the attitude of the last century:

> "It is with government as with medicine; its only business is with the choice of evils. Every law is an evil, for every law is an infraction of liberty. Government, I repeat it, has but the choice of evils . . ."[19]

I do not intend to draw any moral or lesson from our survey of legal rights. Neither do I condemn the individualistic attitude of the Nineteenth Century. Doubtless such an attitude adequately expressed the need of its time. The demands of an expanding industrial and commercial life were for security of transactions and freedom of activity. The doctrine met a ready response in this country due to the pioneer character of our civilization, our necessity for self-reliance, our abundance of resources and our need for individual rather than social development. The real danger of such an attitude lies in its stagnating effect on constructive thought. We are lulled into a state of lethargy, believing that rights are really the inner sanctum of the legal system. This they most certainly are not. They are the products of their time, the legal representatives of social and economic interests which the law has gathered into its fold. They represent the social interest in the security of acquisitions and transactions, an interest which will always persist as long as civilization endures. But the importance of this interest is not uniform throughout the history of the law, and even during a single period it is not consistently predominant throughout the jural order. Legal history moves in alternating cycles of certainty and morality. Each has its place in the system and each its hour of triumph. The swing of the pendulum is certain to follow, and our preference of direction is probably not important except to ourselves.

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[17]Russel v. State (Ind. 1904) 69 N. E. 482; Pickard v. Collins, 23 Barb. (N. Y.) 444.

[18]Bill Posting Co. v. Atlantic City, 58 Atl. 342. See also, Terry, *Constitutionality of Statutes Forbidding Advertising Signs on Property,* 24 YALE L. J. 1.

[19]p. 95 (1931 Ed.).

MUNICIPAL PROPERTY BEYOND THE CORPORATE LIMITS AND NOT FOR MUNICIPAL PURPOSES, ACQUIRED THROUGH CRIMINAL COURT ACTION

WILLIAM HEMINGWAY*

The study of municipal law is by many regarded as useless to a certain extent because of its similarity to corporations, and because one who is familiar with corporate law can easily acquire all the knowledge needed of the other. But such is not the case. Many fine points mark the difference, and especially is this true as to governmental functions. Municipal corporations are supposed to have their powers under three heads: 1. express; 2. implied; and 3. essential. But sometimes it is difficult to assign the exercise of power to any of the three mentioned.

A case or instance of this arose in Mississippi many years ago. A city owned a lot in another municipality, about 100 miles distant. In addition to being beyond the corporate limits, it was not for any of the municipal purposes or uses which may extend beyond the city limits.

In addition to the property's being beyond the city limits and the purposes to which it was to be put, the manner of acquisition of the property must be considered. There are two methods of acquiring property: one by active agency, such as the use of municipal funds to buy outright; the other to acquire by condemnation. To these may be added a third, that is by forfeiture of taxes. There is another manner of acquiring property without use of municipal funds, such as by devise or adverse possession, but this is a passive acquirement, and no action is required by the governing body beyond acceptance.

The property in question had been acquired by a forfeited penal bond in court, without any act of the municipal body so far as the legislating power of the city was concerned. It was forfeited for non-payment of taxes by the holding corporation and deeded to the state, which relinquished its title, since the property of a municipal corporation is tax exempt.

"Authority on the part of a municipal corporation to acquire property includes any usual mode of acquisition, not prohibited by law, as by devise or bequest, by purchase or gift . . . by dedication, . . . by prescription or adverse possession."[1]

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[1]43 C. J. 1337, § 2097.

The power to acquire land beyond the corporate limits for proper purposes without a statute or any form of authorization has been held to exist.

We will first consider acquisition by devise. Mrs. Ellen Moore devised her home "Oakwoods" to several with remainder to the City of Jackson for a public park. One of the devisees was a sister, who had died. Mr. J. T. Lester, her husband, is entitled to receive from his wife any interest she inherited from Mrs. Moore. Oakwood was situated just outside the city limits, and Mr. Lester contended that the city had no power to take under the devise, and exhibited his bill in Chancery Court to cancel so much of the will as devised the estate in remainder. The city filed a demurrer. One of the points pressed was that the city could not exercise its sovereignty over the Park. The court said, "it does not follow that because it may not be sovereign it may not be owner." The court further said: "We confess our inability to appreciate the distinction, so zealously pressed in argument, between the right of a town to have a park within its corporate lines and the absence of right to acquire one, even though donated to it, if it lies beyond such lines."[3] Mississippi had no statute at that time authorizing such an act on the part of the city of Jackson.

It has been held that to secure a debt due by a defaulter that land may be taken. It is not stated to depend upon the question of whether the land was within or without the limits, and the purpose does not appear to have been for parks nor for any other municipal purpose.[3]

In another case of a defaulter, it was held that, when not expressly prohibited by statute, or when not otherwise provided, a municipality may avail itself of all rights and remedies afforded to an individual,[4] and it may take any kind of property in such cases.

In Rhode Island, although the court holds that a town cannot expend moneys raised by taxation for any other than municipal purposes, the acquirement of land by adverse possession does not involve any expenditure any more than does the acquirement by gift or devise, and it has been decided that a gift or devise may be accepted without any intention to use it for municipal purposes. Land so acquired may be leased or sold to alleviate municipal burdens. That case holds that land may be acquired by adverse possession for other than direct municipal purposes.[5]

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[3]Lester v. City of Jackson, 69 Miss. 887, 11 So. 114 (1892), citing 99 N. Y. 671, 2 N. E. 642 (1885); see also, 43 C. J. 1337, § 2097, Note 12.

[3]Phipps v. Morrow, 49 Ga. 37 (1873).

[4]Buffalo v. Bettinger, 76 N. Y. 393 (1870).

[5]New Shoreham v. Ball, 14 R. I. 566 (1884); 43 C. J. 1338, § 2097, Note 23 and cases cited.

This seems to indicate that where the municipality is passive there is no limit to the acquisition of property for value or income.[6]

A town may own land derived by a colonial grant, not required for governmental purposes, in its proprietary capacity as distinguished from public ownership.[7]

"Indeed the cases hold that if land be acquired *ultra vires* by a corporation, the title passes, nevertheless, and cannot be collaterally impeached."[8] If a municipality may own land outside its limits it may also own land in another municipality for municipal purposes.

The question was raised, whether the city of Portland, acting in its corporate capacity, could own and control a farm within its limits, disconnected from any public use, and for its own emolument, profit, and advantage. In this connection the court said: "It may be conceded that a city or town would not have the right to raise money by taxation for the purchase of such a farm. . .

"But it does not follow that a city or town might not be the lawful and legal owner of a farm or of a block of rentable buildings, and might not as such owner maintain the same for its own pecuniary advantage."[10] Having come into such ownership it would be authorized to maintain such until some disposition could be made of it.

If this is the rule as to property within the city limits it can be reasonable to allow such ownership when it is thrust upon a municipality by a court. It will be noted that in addition to other restrictions, that the one as to use of money raised by taxation is the most powerful; the other is as to the purpose. On the other hand there seems to be no limit to acquisition of property where the municipality is the passive recipient of property; provided that it divests itself of the ownership whenever possible.

In the case under consideration, the question of ratification did not arise until the property was sold, but was that a proper subject for consideration, since no agent of the municipality transferred the property, nor received a conveyance? In fact no deed seems to have ever been made. This, therefore, is more than a passive capacity. In fact, in order to have avoided the forfeiture of the bond the city would have been compelled to have rejected the land, refused to assume ownership, and possibly have the land escheated to the state.

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[6]Coggshall v. Petton, 7 Johns. Ch. 292; Hamden v. Rice, 24 Conn. 350.
[7]Islif v. Estates, 224 N. Y. 449, 121 N. E. 351 (1918).
[8]New Shoreham v. Ball, 14 R. I. 566 (1884).
[9]Somerville v. Waltham, 170 Mass. 160, 48 N. E. 1092 (1898).
[10]Libby v. Portland, 105 Maine 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141 (1909).

When the municipality under appropriate procedure had the land stricken from the list of land forfeited to the state for delinquent taxes for the first time, the municipality assumed ownership.

Where no special grant has been made, the right to hold property will be implied as necessary to carry out powers granted.[11]

The municipal court has been established in the charter of the municipality. Such courts have some inherent powers. The power to grant bail and take forfeiture when bonds are forfeited, are essential to the court; otherwise it would have no power. All courts have such power.[12]

The question of *ultra vires* could hardly be raised, for the municipality has exercised no power, actual or otherwise. If their authority to hold the property should be raised, only the state could raise it, since the question of transcending its power is involved, and not misuse of tax money.[13]

The right of a municipality to acquire land for one purpose and use it for another, or to hold it for one use, has not been questioned by the courts. The reverse should also hold, that land acquired for no proper purpose could be held until disposed of, and the proceeds of the sale used for the benefit of the citizens.

In the Phipps case, *supra*, and the Morrow case, *supra*, the courts permitted the acquirement of land to protect the municipality from loss by embezzlement. This is no stronger than the enforcement of law and the forced respect for the processes of the Court.

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[11]43 C. J. 1327, § 2082, Note 79.

[12]Fuller v. State, 100 Miss. 811, 57 So. 806, 57 So. 6, 39 L. R. A. (N. S.) 242 (1912).

[13]McQUILLAN, MUNICIPAL CORPORATIONS, 1124.

RADICAL DISFRANCHISEMENT IN MISSISSIPPI (1867-70)

WILLIAM A. RUSS, JR.*

The South had been so hopelessly defeated in the Civil War that, once the carnage was over, it expected the worst. The very fact that it had bravely carried on the struggle long after all possibility of victory had ceased, made it even more helpless when the end came. The records are clear that after Appomattox, the defeated secessionists were willing to take whatever punishment the North pleased to mete out to them—provided it was certain and quick. But the victors were divided; and Lincoln's assassination made the task of the conservatives of the North more difficult.

Radicals later blamed the intransigent attitude of the Southerners upon President Johnson who, said they, instigated the rebels to hope for better terms. At all events the new President (who declared that he was following out Lincoln's policy) proceeded to apply his plan of clemency toward the vanquished and, by that means, to bind up the wounds of the war. Soon a series of proclamations to each State, except Tennessee, laid down the terms upon which he would countenance restoration and upon which he would recognize the reconstructed governments. These terms included the acceptance of a provisional governor who would direct the reorganization of each State government, and the election of a constitutional convention which would abolish slavery, repudiate the rebel State debt and repeal the ordinance of secession. Judge Sharkey was made Provisional Governor of Mississippi. Under him, the State proceeded to carry out the wishes of the President.

But the very theory upon which Johnson restoration rested was a dangerous one. It was based upon the assumption that the President would use his pardoning power generously enough to enfranchise all rebels who were willing to help in the reconstruction of the State. In short, Presidential reconstruction from the standpoint of the franchise, was *enfranchisement* of rebels— a procedure which seemed satanic to the radicals at the North, who felt it was unthinkable for a man who had aided in the rebellion now to aid in reorganization. This, perhaps, was the weakest portion of Presidential reconstruction.

Furthermore, the President's hand was not strengthened by the lack of wisdom on the part of his friends in the South. They accepted him

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at his word—sometimes anticipating his word. The leading rebels in all the States, but especially Mississippi, offered their services in the task of reconstruction and, therefore, had to be pardoned if the President's policy was to be carried out. Humphreys, the first elected Governor under Johnson reconstruction, did not even have his pardon when elected. Similar individuals, who were stained with what the radicals termed treason, were sent to Congress in December, 1865. With the refusal of Congress to admit the representatives from any reconstructed State, the fight over disfranchisement was on. It was fated to continue in Mississippi for about five years.

What was in the minds of the radicals? What did they fear if Mississippi's Congressmen were seated? The answers to these queries are apt to be somewhat indefinite because the problem of disfranchisement of the rebels was so closely connected with representation of the States. States were represented in Congress by individuals; and, if individuals were refused their seats—either because of their past careers in the rebellion, or because their States were considered to be still in a state of rebellion—it was disfranchisement in either case. In both House and Senate, during the winter of 1865-66, weeks were spent in canvassing the old problem as to whether the rebel States had ever been out of the Union; if they had been, they were now conquered territory, all rebels were disfranchised (by their own wish to become subjects of a foreign power, the Confederacy), and the States did not even exist to be represented. On the other hand, if the States had never been out of the Union and, during the late struggle had been merely in an unnatural relationship to the national government (as Johnson declared), it was unjust for the victors to refuse the rebels the franchise if they were willing to take the oath of allegiance.

Senator Cowan of Pennsylvania, a Democrat, wished to admit the presumptive representatives to their seats because it was unjust to tax the Southerners without representation and enfranchisement.[1] Fessenden of Maine, in those days a torrid radical, inquired of Cowan why, if the North could kill Southerners in rebellion, it could not tax them without representation. Cowan answered that it was the duty of every government to protect its citizens; that the North could not do this in the early days of the rebellion; and that therefore it had no right to punish them now. Fessenden answered this by saying ironically that "until we put down the rebellion all our power was to destroy." The war had just ended the previous April, he said, and Congress could not meet until December; therefore the rebels had been taxed without representation less than ninety days. Furthermore, the President was still occupying these States with

[1]GLOBE, February 23, 1866, p. 989.

"his" army; hence the people were not in a sufficiently settled condition to take on civil duties. It was unreasonable, Fessenden continued, for Senators to demand representation *"instanter,"* for the United States had a perfect right to govern and to tax the South while the Committee on Reconstruction was inquiring into the condition of affairs there. The very fact that the States had seceded gave Congress full power over them once they had been conquered. He continued:

> "I assert the power in its fullest extent; I assert that by the civil war they lost all the rights which I have enumerated, and we acquired those which I have specified . . . I assert that they have many things to do in order to regain that position. I assert that in the mean time we have a right to govern them, . . . this country has been in a state of war, war according to the books, war in its worst acceptation, war in the very strongest meaning of the term, without qualification or limitation. [Is there any question as to the consequences of war? No:] the conquerer has a right, if he chooses, to change the form of government, . . . to punish, . . . to take entire control of the nation and the people, . . . to exact security for the future, and such security for his own safety as he may demand; . . ."

Civil war, he continued, must be carried on by the laws of war, and therefore the consequences were the same. Would anyone dream of allowing his enemies, whom he had just defeated, the vote and a voice in how they were to be treated? He admitted that Congress should enfranchise and admit the rebels as soon as it could do so safely, for it was not only unjust to keep them out too long, but it also taught Congress to exercise a power which the Constitution did not give. Let them in, he concluded, as soon as possible, but let Congress set the conditions. If the President could set the terms, why could Congress not do likewise?[3]

These doctrines of Fessenden, one of the better radicals, epitomize the ideas which were prevalent amongst Republicans in the Senate: Mississippi and the other States must be punished by some kind of disfranchisement, not only of the State, but of rebels within the State.

One speech must suffice to indicate what radicals had in mind in the House. One of the extreme radicals in that body was Bromwell of Illinois who, on one occasion said:

> "They (Southerners) tried the wager of battle. It has failed . . . They come with their broken constitution and their violated vows, with the flag of their country beneath their feet and the flag of secession flaunting its folds before heaven. Here they come, legislature, judiciary, army, navy, pirates, guerillas, every species of force which they can collect from the four quarters of this land, and present themselves in battle array; . . . They come here to demand the right to legislate for the

[3] GLOBE, February 23, 1866, pp. 987-991.

> people of this country, who have not yet all returned from the mournful task of burying the mangled dead of the nation, over whose tombs these men must walk to take their places here. They seek to mingle with the loyal defenders of the country, and scarcely deign to take their shoulder-straps from off their clothes when they ask to sit down here to legislate for the men of Fort Donelson, Chickamauga, and Gettysburg. They come here to legislate. Who? Think of it! Governors who are just from turning over to their successors galleries appropriated to old secession flags which they have gathered to place before the people, to remind them that the men whom they led beneath these flags have fought and gained their glory in war against their country; thus to keep alive secession and all the diabolical principles which nourish and sustain it."[3]

Spurred on by such rhetoric, opinion in and out of Congress demanded action. Johnsonian *en*franchisement was dead; radical *dis*franchisement took its place. The vindictiveness of radicalism crystallized itself into the Fourteenth Amendment, whose third section disabled all those Southerners, who, having taken an oath to the United States as office-holders before 1861, later had entered the rebellion. The Amendment was submitted to all the Johnsonian State governments in order to test their loyalty. Faced with this radical gesture, every restored State legislature (except Tennessee, whose case was different) haughtily cast the evil thing back in the faces of the radicals. Mississippi refused to ratify for many reasons; one reason, which was common to all, was the unwillingness to disfranchise its sons who had fought in the recent war. Mississippi, along with her compatriots, had spoken in no uncertain terms. It was now the turn of the radicals.

The issue was fought out in the Congressional elections of the fall of 1866, in which the radicals won a sizable majority in the House. The North had spoken. In due course of time three military reconstruction bills were passed: March 2, March 23, and July 19, 1867. These acts were devoted to the purpose of forcing the recalcitrant States to disfranchise their rebels whether they wished to or not. The Johnsonian governments were declared illegal; five generals were placed over as many military districts; strict oaths were laid down which must be taken by every official under these commanders; directions were given for registering the negroes and those whites who could qualify under the third section of the Fourteenth Amendment (which was not yet part of the Constitution); this purified electorate was then to choose a convention which would form a new Constitution, accept the Fourteenth Amendment, and disable enough rebels to suit the wishes of the radicals in Congress. We now come to the real problem of disfranchisement in Mississippi.

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[3]Quoted by WILSON, HISTORY OF RECONSTRUCTION, pp. 73-5.

This State, part of the Fourth District, was fortunate to secure for its commander E. O. C. Ord, who, of all the generals, except Hancock, tried to perform his duty as noiselessly and efficiently as possible, without disturbance or notoriety; at the same time, he endeavored to give as fair a chance, as might be, for the whites to fulfill conditions under the reconstruction acts. For his impartiality and moderation he encountered the opposition of radicals everywhere as a Johnson man who was attempting to use his official position to swing his District over to anti-radical politics. The records of his administration, which are preserved in the Munitions Building at Washington, show good order and a meticulous care for details:[4] in brief, he was a conscientious military man, anxious to obey orders, but also desirous of applying them with as much decency and humanity as possible.

His first task was to secure able loyal registrars—a task which was difficult in rebel Mississippi. With this in mind, he appointed, on April 15, 1867, from his staff, a registration board, whose duty it was to examine applications for positions and to correspond with the leading Union men of the State for the purpose of receiving recommendations of good men who might be used as officials.[5] The board having deliberated upon and investigated all applicants, was then to recommend those whom it found to be suitable. That Ord's task in getting ability, coupled with loyalty, was not easy, can be inferred from his statement to Grant, on June 15, that "The system of colored or white challengers is utterly impracticable in this district; I can hardly find loyal men enough for registrars."[6] He was most anxious to get competent assistants, so was forced to appoint men who did not suit the radicals in the least.[7] G. C. Doane, President of the Mississippi State Republican Committee, protested to Sumner that " . . . half the *Registers* are perjured traitors, [and] two thirds of the Bureau Commissioners [have] Sold out to the Rebel element"; yet in the same letter he indirectly admitted Ord's difficulty by saying that "So few in Number are loyal men here, that a Call for a Rep State Con. was represented by delegates from fourteen Counties out of Sixty-four!"[8]

Ord, unlike Sheridan, was not willing to force his own interpretation of the disfranchising provisions of the reconstruction laws upon the District, and delayed registration until President Johnson could have the Attorney General decide who were really disqualified. This raised the ire of the Congressional radicals because it gave to the Johnsonian party

[4]See, for example, "Oaths of Officers 1867," (vol. 46 of Fourth District series), which has names of all who took the oath of office, such as registrars, sheriffs, clerks and judges.

[5]"Registration Board Proceedings of 1867," (vol. 47 of Fourth District series).

[6]SEN. EX. DOC. 14, p. 141, (40 Cong., 1 Sess.).

[7]See HOUSE EX. DOC. 1, part 1, vol. 2, p. 25, (40 Cong., 2 Sess.).

[8]Doane to Sumner, July 25, 1867, in Sumner Papers, CLIV, 182.

a chance to increase the rebel vote in its own interest. And when Stanbery's decisions limiting the incidence of disfranchisement was published, Ord, alone of all the commanders, at once placed it in force in his District. This led the extra session of Congress in July so to bulwark registration procedure that radical wishes would be followed. The Chicago *Tribune* protested vehemently against Ord's act in ordering his registrars to follow Stanbery's decision, because "Mississippi, of right, belongs to the Republican party, but unless something is done to save it, General Ord will turn the State over to the Copperheads."[9] Ord, it continued, who was holding office under the laws of Congress, was working to nullify those very laws. So angry were radicals at him that he, alone of all the five generals, received no thanks for his work, when it pleased Congress later to pass resolutions of thanks to the commanders.

The above letter of Doane indicates what the local radicals thought of Ord's appointments, but does not show all. Out of many letters showered upon the radicals in Congress protesting against his administration and predicting the carrying of the State by the rebels, were those of one R. W. Flourney of Pontotoc, who represents perfectly the type of small-bore politician who was able, through radical reconstruction, to raise himself to a place of prominence, if not of honor. The rebel Memphis *Avalanche* dubbed him "a low lived whelp . . . who deserves to be gibbeted with the contempt of the people."[10] Be that as it may, he saw it as his duty to keep leading Northern Republicans informed of affairs in Mississippi; one of his letters to Butler must suffice to typify the quality of the leaders who composed the radical group in that State. He informed Butler of his work in organizing those freedmen who were willing to work with the Republican party, but added that many parts of the State had not yet been visited because of the "hatred of the rebels, and the refusal of Gen. Ord to give even assurance of protection to loyal men . . ." Some planters were threatening to drive away any of their freedmen who dared to ally themselves with radicals. Loyal men, he averred, understood that Ord was "in the employ of President Johnson [and] that he is here not for the purpose of aiding loyal efforts, and protecting loyal men; but to aid in bringing Miss. into the Union as a Johnson Copperhead state." The opposition was a rebel party, anxious "for an opportunity of dealing a deadly blow to the Union." His desires were as follows:

> . . . there must be a ruling loyal party here. To tell me that the United States after all the Sacrifices of men and money to prevent disunion should now turn these States of rebellion to the controle [sic] of the very men, who are today more bitter

[9] CHICAGO TRIBUNE, July 17 and 19, 1867.
[10] June 20, 1867.

in their hatred . . . than . . . 1860, is to tell me the United States is bent on Suicide . . .

What is the test of loyalty! oaths they are humbugs when uttered by the lips of traitors. There is but one test, let these men identify [sic] themselves with the radical party. [sic] not because they are radicals, but because that party is the only true Union party of the country. It is the party that beat down the rebellion, hence it is detested by all rebels at the South and every enemy of the country North. . . . Neither Supreme Courts, Presidents, or Generals, must be permitted to obstruct its march in the accomplishment of this great end. . . .[11]

The very illiteracy of the above is a sad commentary on the kind of leadership that radical reconstruction was raising to the fore in the South; and it helps to explain why it was that the so-called rebels were later successful in killing the Constitution framed by Flournoy's faction.

Led by conservative papers like the Vicksburg *Herald and Mississippian,* the whites began to organize and campaign. That journal urged activity in order to defeat the convention: "IT IS THE BOUNDEN DUTY OF EVERY MAN IN MISSISSIPPI, WHITE AND BLACK WHO WOULD AVERT A BLOODY STRIFE AND SECURE A PERMANENT PEACE TO REJECT THE RADICAL PROGRAMME AND VOTE AGAINST A CONSTITUTION."[12]

As usual the rebel papers made bitter and sarcastic remarks in their descriptions of the radical efforts to organize the State. The following, regarding the Radical Republican State Convention, clearly evidences rebel opinion.

THE GRAND MONKEY SHOW AT JACKSON

The capital building has been converted into a menagerie, for the last two days, and every variety of gorilla has been exhibited, from the most uncouth to the highly cultivated. As the animals jumped around under the whip of the ringmaster, it was beautiful to behold, and the graceful somersaults and exposures occurred which are usual in all monkey exhibitions. A number of the native Rads. were on hand—Rads *en masque,* who were trembling in their boots fearful that something would turn up that would expose their unhappy situation. . . . All the rest of the Southern Rads on hand were splendid specimens of stupidity, obscurity, and filth. There were three or four sensible negro men in the Convention, but the mass of the assembly would compare well with any baboon show in the country. We will give the platform of the concern to-morrow. It will suit the most intense negro worshipper in the land, . . . The Northern gentry who have come to this country on small rations and

[11]Flournoy to Butler, June 25 (?), 1867, in Butler Papers.

[12]HERALD AND MISSISSIPPIAN, June 12; see also June 18, September 25, 26, 27, 1867.

> slender respectability will find their hopes of public pap vanishing as their designs are exposed, and we tell them plainly that the people of the South will not long even tolerate the idea of being governed by a set of jackasses from a Northern clime.[13]

It goes without saying that such editorials merely made the Radicals more vindictive and helped to make possible the severe disfranchisements in the Radical Constitution.

Great exertions were expended by the older element to vote the convention down—but to no end, except that of angering the radicals. W. H. Gibbs, mayor of Woodville by appointment of Ord, told Washburne, after the convention had been voted for, that in the recent election,

> strong efforts were made by the *unreconstructed* element to persuade the blacks not to vote & every artifice that could be used was brought to bear to prevent it. In many localities they Succeeded in doing this, and the Convention if Carried has only by a small majority of the number registered. They were threatened with being discharged from employment if they voted and in many instances this was done and many were discharged with out pay & turned off homeless [.]

He wished to know whether, in answer to this rebel effort, the Constitution about to be formed "should be framed on the basis of moderate or extreme proscription of the disloyal element (& it is large) and Should disfranchisement extend to the many or the few? Is the Republican [sic] ready & willing to stand by the present Congressional plan or will that plan be moderated or revised [.]"[14]

The constitutional convention was overwhelmingly radical[15] and its members wanted jobs. An ordinance was tabled on January 17, 1868, to inquire why so many loyal citizens were disfranchised and why so many rebels could vote.[16] Then on January 22, 1868, it memorialized Congress to vacate, or to allow it to vacate, all those State offices which were now held by rebels so as to fill them with loyalists. It said: "They (radicals) found this government administered by rebels, not in name merely, but really such in heart, in head, in policy, indeed in all respects save open hostility." Moreover the present officials were elected in 1865, "by not more than one-third of the white men, who were authorized to vote by the President's proclamation." These were "the broken fragments of secession and rebellion," and ought to be removed.[17] The fifteen conservatives protested against this memorial, saying that the State was not

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[13] HERALD AND MISSISSIPPIAN, September 12, 1867.

[14] Gibbs to Washburne, November 26, 1867, in Washburne Papers, XX, 257.

[15] See "Record of the Election for the State of Mississippi 1867," (vol. 54 of the Fourth District series) which gives votes for and against Convention and delegates in each county.

[16] JOURNAL OF THE CONVENTION, pp. 52-3.

[17] HOUSE MIS. DOC. 54, vol. 1, (40 Cong., 2 Sess.), and ANNUAL CYCLOPAEDIA 1868, p. 507.

in rebel hands and that there were not enough men who could take the test-oath to fill all the offices. The radicals, by offering a resolution to prepare a list of those who deserved amnesty, admitted the statement that there were not sufficient men who could take the oath.[18] Finally on May 14, about 130 names were sent to Congress for removal of disabilities.[19] The reason for this is clear from a letter of one of the radicals to Speaker Colfax: "We need these men to fill certain positions in the party, and to labor for its success, and it is of great importance to *us* that their disabilities be removed so that the reward of loyalty may be seen and felt. They have all done us great service, and are still at work fighting valiantly side by side with the best and truest radicals of the party. We want them for office."[20]

Meanwhile a number of peculiar resolutions and ordinances regarding disfranchisement were being offered for insertion in the Constitution. One such, sent to committee, would require all rebels to swear that the question of secession had been settled by the late war; and "that the Union of the United States cannot be dissolved but by successful revolution or universal consent. I will hereafter neither say nor do anything calculated to disturb unity. . . . I will sustain and uphold the right of universal suffrage. . . ." This was to go into effect a year after State representatives were admitted to Congress; meanwhile the vote was to be exercised according to the restrictions of the reconstruction laws.[21] A long ordinance of five pages was offered, containing an atrocious franchise clause which disqualified all for armed hostility or for giving aid or comfort to the enemy; for adhering to enemies; for submitting to, or belonging to , secret organizations in aid of the rebellion; for taking part in guerilla warfare or in bushwhacking; for leaving the State to escape the draft; or for seeking the protection of any foreign country to evade army service.[22] This was referred to the committee on franchise. An ordinance requiring a registry law with a strict oath was also sent to the committee.[23]

Article VII of the Constitution, as finally adopted, provided for very severe disfranchisement. The legislature was ordered to provide for the registration of voters, who must take an oath that they were not disfranchised by the reconstruction acts of the 39th and 40th Congresses, "and that I admit the political and civil equality of all men: so help me God: . . ." But if Congress removed such disabilities and the legislature then concurred, the removal also applied to Mississippi. No one might be an office-holder who ever voted in the legislature for a secession convention,

[18] JOURNAL, p. 53.
[19] *Ibid.*, pp. 574 ff, 689-92.
[20] Quoted by GARNER, RECONSTRUCTION IN MISSISSIPPI, 203.
[21] JOURNAL, pp. 53-5.
[22] *Ibid.*, pp. 63-8.
[23] *Ibid.*, pp. 90-3, 383.

or for secession in a convention, or gave voluntary aid to the rebellion, or exercised any office under the rebel government—although anyone who had aided in reconstruction, who had voted for the present convention, and who had continuously advocated reconstruction, was not subject to this provision. The legislature was empowered to remove disabilities. Disfranchisement, however, was not to apply to the private rebel soldier unless he had voted for, or signed, a secession ordinance. The oath of office required an official to swear he was not disqualified by either the United States or Mississippi, had never voted to call a secession convention, had never been a member of a secession convention, and had never voted for or against any ordinance of secession.[24] This article on the franchise would disable so many in the State that one member tried to secure a promise of general amnesty in 1875, but failed.[25] Morgan, a conservative, offered, in derision, a resolution that "This Constitution shall not be so construed as meaning anything wherever any disfranchising clause appears";[26] but the radicals had their way.

The disfranchisement under this Constitution was especially abominable in the eyes of conservatives, because it required them to admit the civil and political equality of the negro. At once they began a campaign to defeat it in order to remain under military rule. For military government would at least mean white officials. The friends of reconstruction feared that proscription had gone rather far, but it was now too late. Hence, as the defeatist movement spread, many radicals, fearing it would succeed, favored delay in holding the elections. W. H. Gibbs told Washburne that unless Johnson was impeached, all was lost, because the blacks were demoralized by the rebel demonstrations: "Our only salvation is in the removal of the President & the removal of the disloyal officers who now hold office in this State. We dare not submit our Constitution until this matter is settled with any hope of success."[27]

The radical fears were justified, for the Constitution was decisively defeated. U. Ozanne, who had been a delegate to the constitutional convention, gave to Stevens the reasons for the radical set-back, as follows:

> Previous to and during the Election, gangs of white men, opposed to reconstruction, prowled around, at night, hunting up the leading freedmen who took an active part in the Canvass, perpetrating on them gross outrages, and by so doing frightening hundreds and thousands and preventing them from voting it, through threats they Could not be induced or Compelled to vote the Democratic ticket. Other freedmen, and their number is

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[24]The Constitution is printed in HOUSE MIS. DOC. 14, (41 Cong., 1 Sess.).
[25]JOURNAL, p. 543.
[26]*Ibid.*, p. 556.
[27]April 11, 1868, in Washburne Papers, XXI, 79.

> large, who were very anxious to vote the Republican ticket, abstained from voting, through fear of maltreatment or of losing their homes and crops.[28]

In short, whether the charges were true or not, the radicals in Congress were told that they had been circumvented by the Ku Klux Klan; and that violence and intimidation had been used by rebels to prevent acceptance of the Constitution. A Congressional committee was ordered to inquire into these charges and found the facts for which it was looking, in spite of statements such as that of General Gillem, commanding in the State, who deposed as follows:

> I believe the defeat of the constitution was due to its proscriptive character as regards voting and the holding of offices. It would not be reasonable to suppose that men would vote to disfranchise themselves; that accounts for all the white men of the State, or the greater portion of them, voting against it.

He said that whites had induced the negroes to vote in the negative; but that a Constitution strictly in accordance with the reconstruction acts would have been accepted. Democrats, he added, appealed "energetically" to the blacks "not to deprive them of the same right" of voting as the negroes now had; some papers advised employing only those who voted Democratic.[29]

Some 153 negroes signed, with "X's," affidavits and depositions that they had been afraid to vote;[30] it was deposed that in Copiah ". . . the Republicans formed in a line, and were [sic] brickbatted, their banner torn up, and then run out of town."[31] A deponent stated that in Caseyville, "I was informed that no d—d rad. could vote there, white or black, they would kill him first." On the other hand there were many depositions by inspectors and registrars that the election had been honest.[32] W. H. Gibbs, who was chairman of the committee of five established by the constitutional convention to see that there was a fair vote, deposed that the committee had appointed three local county commissioners to supervise elections; but that in spite of watchful care on the part of these commissioners there had been much intimidation of the negroes on the part of rebels. In his opinion, the Constitution had, therefore, been legally accepted by the State, and, in a proclamation of November 3, 1868, from Jackson such declaration had been made.[33] R. W. Flournoy told of intimidation against himself while campaigning, when rebels had drawn

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[28]July 9, 1868, in Stevens Papers, XII, 54931.
[29]House Mis. Doc. 53, pp. 63 ff, (40 Cong., 3 Sess.).
[30]*Ibid.*, pp 147-53.
[31]*Ibid.*, p. 172.
[32]Ex-Governor Sharkey believed the election had been full and fair, *Ibid.*, p. 3. For other papers on this election see *Ibid.*, 181, 192, 198, 202, 269, 273-87.
[33]*Ibid.*, pp. 1-23.

knives against him. He, like Gibbs, believed that the Constitution had been accepted by a majority of 3,880 votes.[34] The Republican convention at Jackson, November 25, 1868, appealed to Congress for admission of the State, declaring that the Ku Klux Klan had kept so many Republicans from voting that the real sentiments of the Mississippi electorate had been nullified.[35]

The upshot of the matter was that Mississippi was not admitted in time to vote radical in the fall of 1868, so Congress allowed the question to idle. The State remained under military rule and its commander continued to find it almost impossible to secure qualified persons to fill the civil offices.[36] The whites had gained, at least temporarily, what they had desired—military rule under white officials. But this species of suspended animation in a military purgatory was distasteful to the radicals at the North, if not to the conservatives in the State. Like Virginia and Texas, Mississippi was a standing reproach against the Congressional policy, which, as long as three States remained unreconstructed, could be stigmatized with the charge of failure.

With the inauguration of Grant, it seemed safe to the radicals to proceed with the final reconstruction of the three remaining States; the law which ordered the separate submission of the disfranchising clauses of the Virginia Constitution applied also to Mississippi. In due course of time, the election was held and the Constitution was accepted by a large vote; but the disfranchising sections were rejected by the conclusive majorities of 87,874 to 2,206; 87,253 to 2,390; and 88,444 to 2,170.[37] On February 3, 1870, Butler, in the House, reported an admission bill similar to that for Virginia which had been recently acted upon. Beck's amendment to admit without conditions was voted down, and the bill passed.[38] In the Senate it ran into the petulant opposition of Sumner who held it up for a week, while he and others argued over conditions-precedent. In the end it was accepted.[39]

The two Senators who were seated from the State epitomized perfectly just what disfranchisement had accomplished. Jefferson Davis' seat was taken by the negro, Hiram Revels,[40] the first of his race to sit in that mighty body. The other Senator sent by the radical government was General Adelbert Ames, whose admission was so stubbornly resisted

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[34]HOUSE MIS. DOC. 53, pp. 24, 253-4.
[35]*Ibid.*, pp. 261-3.
[36]See HOUSE EX. DOC. 1, vol. 1, pp. 585 ff., (40 Cong., 3 Sess.), for an example. For an instance to indicate how all local elections were stopped, see Letter 24, vol. 69 of the Fourth District series in "Letter Book Dist. of Miss. Sub. Dist. of Miss."
[37]GLOBE, February 10, 1870, pp. 1173-4.
[38]GLOBE, February 10, 1870, pp. 1013-4.
[39]*Ibid.*, pp. 1127, 1173-4, 1174-84, 1209, 1252, 1281, 1322, 1356, 1366.
[40]*Ibid.*, p. 1568.

that he was not seated until April 1, 1870.[41] The objection to him was, as Senator Norton said, that he was "A man who is there by virtue of his position as a general of the Army, not even a citizen of the State of Mississippi, but a military officer having control and direction and manipulating the elections in that State, . . ."[42] Conkling for the Judiciary Committee reported against Ames because he was not a citizen of Mississippi;[43] nevertheless he was finally admitted and represented a State to which he was a total stranger, except as a conqueror. Of the delegation in the House, two (Harris and Morphis) could not take the iron-clad, so were allowed to subscribe to the oath of July 11, 1868.[44]

Meanwhile, in Mississippi, there were the usual troubles regarding officers who could not qualify. The law admitting the State had provided that all those entering office, except whose disabilities had already been removed, must take a strict oath. While many of the prominent Republicans who needed it had been granted release from their ineligibility, a concurrent resolution of January 15, 1870, was required to relieve about 139 disqualified persons, so that the State government could function.[45]

Mississippi's sufferings during radical reconstruction were severe enough; yet under the disabling clauses of the radical Constitution, they would surely have been infinitely worse. By following Virginia's policy of intransigence, it escaped a fate, which, under complete disfranchisement as projected in the Constitution, would have been unthinkable. The carpet-bag politicians in Mississippi, as in Virginia, overshot their mark, and, in the end, gained nothing. The failure to secure any disqualification whatever in the Constitution bespeaks not only the break-down of the radical policy of reconstruction, but also the fact that in a republic, intelligence and experience cannot be kept out of the government forever. That the radicals thought otherwise is a pertinent commentary on their political sagacity.

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[41] *Ibid.*, p. 2349.
[42] *Ibid.*, January 19, 1870, p. 563.
[43] Sen. Report 75, (41 Cong., 2 Sess.).
[44] GLOBE, pp. 1516, 2521.
[45] GARNER, RECONSTRUCTION IN MISSISSIPPI, p. 272.

YOUNG LAWYER, NOW WHAT?

LOUIS COCHRAN*

When Abraham Lincoln first received his license to practice law all that the young barrister needed to make a start in life was a copy of Blackstone, a good pair of galluses, the gift of gab and a fairly good notion of right and wrong. Nowadays things are different. Blackstone is a name to which much lip service is made, and conditions have so changed that though the average young lawyer with fair advantages not infrequently drains the family pocketbook and spends seven years of his life in preparation for his profession he finds as a general rule upon his admission to the bar that there is not only apparently no room for him but that his class room theories and philosophy leave him ill adjusted to cope with the harsh realities of an ordinary legal career.

The young lawyer has been taught, and correctly so, that the practice of law is a public function and as the legal profession is a part of the governmental machinery of the state that he is an officer of the state and a member of a privileged class. Too often the young lawyer leaves his college class room with a mild contempt for his middle aged colleagues puttering about with cases of no consequence, except to the litigants, and living a hand to mouth existence with the ever present specter of a foreclosure sale never far in the offing. He reflects that he is entering a profession which not only abrogates to itself one-third of the machinery of government but which not infrequently controls also both the executive and legislative branches. He sees himself sitting in the seats of the mighty, and dismisses with a mild disdain the hordes of his brethren who dwell all their lives in genteel poverty, bickering over petty police cases, chasing after collections, or sitting frustrated and indifferent in musty offices while waiting for the big case just around the corner which is the mirage, the hope, and the despair of every lawyer's life. Such near-failures are not for him, opines the fledgling—and it is a kind fate which conceals from him the fact that in the majority of instances he is but gazing at a future reflection of himself.

Lawyers were comparatively few in Lincoln's time, and the lawyer once could look forward to the gradual accumulation of a competence, and a position of dignity and broad influence throughout his life. With the rapid increase in the population and wealth of the nation more and more ambitious young men entered into the profession both as a means of a livelihood and as the open sesame to political preferment. The de-

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sire of colonial parents that at least one of their sons enter the ministry was transplanted to the legal profession and for this and other causes it is the most over-crowded of professions. Breathes there a village with business so dead that does not count at least two lawyers among its citizenry—though the population be but half way to the thousand mark? A town of three thousand souls which does not boast from a dozen to twenty living and more or less liveable barristers hath no public spirit, and a more fitting fate than its complete demolishment cannot be imagined. This condition is the more astonishing when one reflects that barely thirty-five per cent of the total population ever have recourse to a lawyer's office, and that this thirty-five percent must support the multiple and multiplying lawyers in such grades of decency as the times permit. Every human being has need of a doctor, if but twice in his life, but the nearest that untold millions of people ever get to a lawyer's office is in the reading of such melodramas as the Hauptmann trial, and similar exposes of human depravity. Laymen often think of the law as a black art (as indeed it is in some respects) and privately believe that such are the fooleries and the knaveries of the law that no man can be a lawyer without soiling in some way his immortal soul. Nevertheless they rejoice with exceedingly great joy when their sons and daughters enter into that potent profession, hopeful as they are that some of their children, or their children's children, will gather to themselves some of the emoluments and imaginary riches of the bar and thus reap for them vicarious vengeance upon this profession before which they stand with helpless and admiring mien. And so the law school of every college in the land is filled to bursting with aspiring youth and the night law school in every small city takes its toll from the toilers of the day.

Since 1890 the number of lawyers have increased nine and one-half times as fast as the population of the country. In the Year of our Lord 1910 there were 19,498 law students in the schools. In 1920 there were 24,503 future barristers, and in 1930 (the last year for which figures are available) there were 43,989. Hopeful and energetic, well trained, and filled, most of them with a genuine desire to serve the true ends of justice and their country they descend upon a populace which cannot readily assimilate them, and either give up the ghost and drift into other professions or hang on tenaciously in a state of genteel poverty until the great lawgiver Himself summons them before the Final Bench. That a few of the brilliant, and some of those few who are actuated with a genuine love of the law, do in time find themselves at the pinnacle of their profession does not relieve the majority from the heart ache of mediocrity, or downright failure.

What is often forgotten both by the lawyer and the layman is that in the beginning the business of making a living and the professions were

as far apart as the poles. The professions originally had as their objective the amount of service which could be rendered without thought of personal gain, and in the early days the legal novitiate was even prohibited from offering to practice law unless he had sufficient private means to keep himself though he collected not a dollar for his services. His fees depended altogether upon the generosity of his clients, and while it was admitted that even a lawyer must eat, it was not without a flush of shame that the barristers pocketed the fees poked them surreptitiously behind their backs.

Such days, unhappily perhaps, are no more. Business in many respects has become highly professionalized, and the practice of law has taken on some of the meaner aspects of business. The lawyer laments the fact that his clients today are not particularly interested in knowing "what the law is" but how they may circumvent and emasculate it. He finds that trust companies and corporations are waging systematic campaigns to deprive him of what a generation ago he would have considered his vested rights. Banks and fiduciary corporations advertise with seductive innuendo for the control of fiduciary estates and the writing of wills and trust instruments. The younger lawyer of today finds that abstract and title companies, especially in the cities, have almost divorced him from the joys of real property, and insurance companies habitually practice law without a license by advising litigants as to their rights and settling with them upon their own terms. In addition to these fast flown sources of legal revenue he observes "arbitration" and "conciliation" projects with thickening gloom, and reflects sadly that already in forty-four sovereign states have Workmen Compensation Laws been exacted, and that the one faint possibility of recoupment in some hoped for air tight damage suit is almost gone. Even in the states where damage suits still glimmer with fitful fees he finds that the defense of such suits have been taken over largely by the corporations, and that only in the smaller towns and communities is such work still in the hands of the lawyer. This leaves only criminal law, the divorce courts, and collections still within the province of the lawyer, and with the rise of such officers as the Public Defender in many states and the impunity and voraciousness of collection agencies even these poor staffs are being taken away.

The picture, however, is not discouraging for the young lawyer who is devoutly in love with his profession, and who woos her as he would an errant mistress. The law founded as it is upon the awakening conscience of man is a structure imbedded in the deepest needs of human nature and as long as civilization exists the world will need lawyers. Only the man trained in the law and in love with life and justice is fitted to judge. administer, and interpret the law. Only the man steeped in the law

and with some experience with the rough and tumble of human realities can best serve his fellows as an executive of the law. From the time that lawyers first wrestled from King John the Magna Charta and evolved the Bill of Rights upon which rests the liberties of of the English speaking world, lawyers have served and fostered and enrichened civilization, and without them mankind would slip back into the chaos which the world knew when law was not. With the dawn of civilization, there were lawyers. More than any other class of men they created civilization, and withheld the barbarians from within and without while religion, science, and literature took root and fed upon their strength. Lawyers are the right arm, the bulwark, of all the gains which the world has made, and should some Frankenstein some day destroy all the lawyers, as Peter the Great once threatened to do, then on that day will all hope disappear from the face of the earth.

Though the profession is overcrowded, so are all professions and vocations. By singleness of purpose, by industry, by unimpeachable integrity, by careful preparation of the cases which come his way, the young lawyer no matter where he settles can within a few years make a name for himself. And when time has weeded out the unfit, the slovenly, the lazy, and the incompetent, from his generation he will find that the day is not long enough for his tasks, and though his fees may often go unpaid, yet will he go neither naked nor unfed. Wherever fate places him the young lawyer of today will find himself because of his training, his experience, and the peculiar advantages that are his the best fitted of all men to serve the changing needs of a changing world. And therein lies his challenge and his great opportunity!

THE ONE, OR MORE THAN ONE-COUNT DECLARATION IN THE FIELD OF TORTS

FLOYD W. CUNNINGHAM*

A review of the current declarations filed in the circuit courts of this State from time to time by plaintiffs makes it obvious that there is much confusion in the minds of a substantial number of the bar as to when a declaration should contain one, or more than one count. This confusion brings about a great deal of uncertainty and lost motion over the entire course of procedure in such cases, and more especially in the trial courts.

This loose pleading is brought about in part by the long-standing, liberal provisions of statutes, such as the Jeofails Statute, Section 600, and also Section 521 of the Mississippi Code Annotated of 1930. The latter, among other things, provides that if the declaration "contains sufficient matter of substance for the court to proceed upon the merits of the cause it shall be sufficient," and it is often misconstrued, both by counsel and the trial courts. Since all forms of common-law pleading are abolished by statute in Mississippi and many other states, there is a tendency on the part of the bar and trial courts to overlook the provisions of such statutes as Sections 554-555 of the Mississippi Code Annotated of 1930, which provide that the defendant may attack the poorly drawn declaration by a motion asking an order of the Court on the plaintiff to make his declaration more specific, so as to meet such requirements as are found in Section 521 of the Mississippi Code Annotated of 1930, "constituting the cause of action in ordinary and concise language without repetition"; and, so as to comply with that propriety required of a pleader in drafting a declaration, that it be so briefly, clearly, and concisely formed as to inform the defendant of the issues involved in an intelligible way, and without encumbering the record with prolixity, as provided in Sections 554-5 *supra.*

The first question that should present itself to the pleader is whether his client really has one, or more than one cause of action. It is the lack of proper understanding at this point that lets in the current of confusion. The term "count" is included in each separate cause of action, either where brought in a one-count declaration, or where several causes of action are brought in several separate counts in one declaration. If there be but one cause of action, the declaration shall contain one count

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only, and if it contain two or more causes of action not so inconsistent as to bar the plaintiff's right to do so he may, and should, state all his causes of action in the same declaration under as many counts as he has causes of action to state.

The pleader should determine whether his cause of action is founded solely upon a common-law right, or whether he is about to declare upon a cause of action created by statute, or both. If it be determined that the given grievance affords a right of action under both the common-law and the statute, then the declaration should contain more than one count. In determining whether or not a certain infringement constitutes a statutory right of action, we should not confuse it with the violation of some statute prohibiting certain acts, but which does not, in connection therewith create a statutory cause of action for its violation.

To illustrate the point, the driver of an automobile might violate every statute prescribing the rules of the road and the regulation of motor vehicles; and yet no cause of action is created for any one of them by statute, but all of them would be subject to proof under a one-count declaration founded on a common-law cause of action, in proximately contributing to a negligent collision and personal injury to Plaintiff, and should be alleged in a one-count declaration just so the several matters are "factors contributing to a single injury or result; where a single and continuous purpose runs through an entire transaction made up of various acts each of which might alone constitute a cause of action."[1]

This presents a very different question to prohibitory statutes for which causes of action are created by statute. This matter is clearly illustrated by our statute, Mississippi Code Annotated of 1930, Chapter 2, on Actionable Words, which prohibits the use of such words, and at the same time creates a statutory right of action to recover for the breach thereof; and this does not in anywise abrogate the common-law cause of action of libel, or slander for the use of the same defamatory language, but if a plaintiff desires to recover both on a statutory and common-law action (or other statutory action not inconsistent with the former) in the same declaration, he is required to do so under separate counts.

This principle is helpfully discussed, but with some confusion of terms, in the important case of *Illinois Central Railroad Company v. Abrams*,[2] which has been followed, distinguished, and commented upon in an array of opinions by our Court, too numerous to cite. The holdings in our State, while not altogether as clear as we should like to see them, place us in a classification under the general rule which the writer is attempting in this article to make clear with the authorities herein cited.

[1] 49 C. J., § 173; 21 R. C. L., § 36; Notes Ann. Cas. (1913C) 101; Hastings-Stout Co. v. J. L. Walker & Co., 139 So. 622 (1932).

[2] 84 Miss. 456, 36 So. 542 (1904).

There are some helpful rules that may be applied in determining when a certain state of facts justify only one count, or more than one:

1. To obtain a clear grasp of how the pleader may perambulate the four sides of the one-count cause of action, it is helpful to make an observation of how that subject has been dealt with by the courts as to whether or not there has been a departure on the part of the pleader in the filing of amended declarations. A clear view of the subject from this particular standpoint is found in *Hardie v. Bulger,*[3] and more fully and clearly in *Franklin Fire Insurance Company of Philadelphia, Pennsylvania v. Franks.*[4] The latter opinion especially makes this clear. This opinion further holds that the pleader may even take an inconsistent position in an amended declaration to that taken in the original, just so his averments remain within the boundary calls of the same, single, indivisible objective—the wrong and damage which constitutes the cause of action. We know of no authority that better defines the four boundaries of the one or more causes of action from this viewpoint than the case of *Chabanin v. Washburn Wire Company,*[5] and more especially the authorities collated by the editor in the voluminous note annexed thereto.

2. One may get an intelligible viewpoint of the different special acts of negligence, and commissions of wrongs that may and should be collated in one count of a declaration in declaring upon one single damaging result, by a determination of whether the bringing in of any such special acts of negligence in an amendment constitutes such a new cause of action as to be barred by the Statute of Limitations, where the time element is sufficient. We do not know of a more intelligible presentation of this thought in a single collation than that found in the notes of the editor in *Ann. Cases,* 1913D, 742, *supra.*

3. The question is sometimes determined on the basis of whether or not the different issues raised by the different counts may be met by the same defense.

4. The question can frequently be advantageously determined by whether or not one verdict will cover and satisfy the full demand.

To further illustrate with the commission of a tort by the operator of a motor vehicle, let us consider the collision and injury as above illustrated, and that will constitute Count No. 1; then let us assume that after committing this tort the same party afterward committed an assault and battery with a club on the injured party, the victim, also, of his first wrong. This second tort upon the plaintiff constituted a separate and distinct cause of action to be declared upon in a separate count and calls

[3]66 Miss. 577, 6 So. 186 (1889).
[4]145 Miss. 494, 111 So. 135 (1927).
[5](R. I.) Ann. Cas. 1913D, 730, and note p. 742.

for an entirely different defense, and justifies a separate verdict of the jury covering any further damage for this particular wrong; and then let us further suppose that this tort feasor left the victim of his former wrongs in a helpless condition, exposed to the loss of blood, and in need of the prompt services of a physician and other aid which Defendant could reasonably have supplied, and from which neglect he was further damaged; and so this inhuman act on his part constituted another and entirely different and separate cause of action and separate count which would require an entirely different defense, and upon which the jury would render a separate verdict for all the damages sustained for this particular tort.

A one-count cause divided up into as many separate counts as there are elements of negligence is productive of endless confusion, and encumbers the trial court with multiplied burdens in the giving of instructions, and presents to the court and jury a Chinese puzzle, so to speak, when it comes to arriving at a clear understanding of the issues, and also on the question of the jury's rendering of a verdict on account of the difficulty of deciding what count their verdict should respond to.

This situation becomes and is a veritable nursery for errors in the handling of issues, and inflicts upon the courts the needless occasion for reversals, and it obtains in furtherance of confusion, and not for the expeditious dealing out of justice under the law.

Many courts of the country tolerate the error of bringing the different elements of negligence under separate counts in the same declaration, even where these elements point to the same single result, but this practice is either founded on some poorly considered statute, or is the result of following down through the decades some precedent not well thought out by such appellate court, and should be studiously avoided in our jurisdiction.

The way is clear if we shall plant our feet upon the rock of sound reasoning; but if we try to follow the sundry cross-currents of court findings in the different jurisdictions, we find ourselves in the position of one who looks about him and finds that every way is dark and confusing; but we find the great weight of authority in Mississippi, as said above, while not uniformly very clear, are nevertheless in harmony with, and not at variance with the views the writer has attempted to express in this article.

MILITARY LAW AND PROCEDURE FROM THE VIEWPOINT OF A MISSISSIPPI LAWYER

ABE D. SOMERVILLE*

One of the interesting incidents of the New Deal has been the calling into active service of Reserve Officers for work with the Civilian Conservation Corps. This is the first time since the World War that Reserve Officers have been on active duty, and it has been of great benefit to the Reserve Officers in preparing them for service in case of a major emergency. This peace time service has been quite different from what the public has thought it to be. Most of my friends have thought that I was drilling young men and giving them some military training. Personally I should have preferred some of this; but the fact is that this work is strictly civilian and there is positively no military training in it for the members of the C. C. C. The officers are under military discipline but the men are not. The military part of the Army is entirely lacking; but the administrative features are present one hundred per cent. Many interesting features developed in this work and some friends have suggested that I describe some of these, thinking that the Bar of this State would be interested. It is for this reason and because of the similarity of the administrative features of Army Work to the Federal Work going on in our state that I have prepared this paper.

The outstanding feature of Army Law and Procedure is the matter of "Forms." Just as the English Common Law developed from certain "Writs," which were in a set form, so the Army Law and Procedure has developed from a set of forms. The only difference is that the Army Law is still in the "Form" state; and I am inclined to think it will remain in this condition. The secret to the proper handling of any of the government work is largely in the ability to understand and interpret forms, to fill the same out quickly and accurately.

The simplicity of Military Law will be noted at a glance by noting that the Manual for Courts-Martial is only a small book containing 280 pages. This Manual covers all the law, forms, rules, and regulations necessary for an officer in the Army either to prosecute or to try any criminal case, including the appellate procedure. It also outlines the procedure for civil matters. Following the custom in Congress, the procedure in civil matters consists principally of "investigations."

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The source of the law as enforced in military courts is of course primarily the U. S. Constitution and Acts of Congress. It is however not confined to this; International Law and the various treaties of this Country play a conspicuous part; and the local law of the jurisdiction where the military establishment is located also plays a part.

The jurisdiction and venue of military courts is transitory; rather than fixed as we have it in civil courts; moving from place to place with the military establishment. A military court in Alabama can try a man from Kentucky for an offense committed in Mississippi with perfect ease. If the military court has jurisdiction over the soldier he can be tried in Mississippi for an offense committed in China. This may seem revolutionary; but it works out with great speed and satisfaction (to the court).

There are three kinds of courts-martial: General, Special and Summary. The last named is the well known "Drum-Head" and consists of one man; very similar to the "desk sergeant" on city police forces, or the rural Justice of the Peace. The General court-martial (12 members) tries Officers and capital cases, the Special (6 members) tries minor offenses and non-commissioned officers. There are also Courts of Inquiry, Military Commissions and Provost Courts as well as "Boards of Inquiry."

It is under this last named head that most of the actual legal work is conducted in the Army. Civil, criminal or other matters are simply referred by the Commanding Officer to a named "Board" to hear the evidence and pass upon the matter. This is the jurisdiction which produces the well known "Benzine Board" so well known during the War. In cases of automobile accidents, to inquire into any part of the civil liability of the Government, the driver, the commanding officer of the unit—all of these matters will be decided by a "Board." If an officer makes any sort of a mistake or if a mistake is made in a C. C. C. camp it will be followed by an investigation by a Board of Officers. The decisions of these Boards are generally final, but appeals may always be taken, and the matter may be carried as far as the contending parties desire.

The safeguarding of the rights of persons accused of military offenses is taken care of under the military jurisprudence in a manner very similar to the procedure in the state of Mississippi. If a man is suspected of an offense his immediate commander is supposed to make some kind of an investigation. If he thinks there is any probability of the man being guilty he then issues an order and appoints another officer who is supposed to be entirely disinterested as "Investigating Officer." This man then makes an investigation and goes into the facts in detail, generally taking sworn statements from the witnesses. The investigating officer then reports back to the commander who refers this report to the Judge

Advocate, if one is available, for an opinion. If all of these concur in the propriety of the man being guilty he is then charged with the offense and placed on trial. It will be seen therefore that the safeguard of the "Grand Jury" is practically covered by this investigation.

The most convenient loophole for court procedure is found in the 104th Article of War which provides that the commanding officer of any detachment may impose disciplinary punishment for minor offences without the intervention of a Court-Martial. A military unit is very much like a family and under this provision the able commander will handle most criminal matters in a manner to avoid all courts-martial. This procedure enabled the commander to inflict the proper punishment by giving special duty to the wayward soldier without the outside world knowing anything about it and makes it unnecessary for him to bother the higher authorities about reporting the courts-martial. This is so well understood in the Army that it is even considered a reflection on an officer for him to have too many of his subordinates tried by courts-martial and if the officer calls for very many courts-martial there will follow a "Board" to inquire into and see what is wrong with the officer that he has to have so many of his men tried by Courts-Martial.

It has been often said that in military courts there is a presumption of guilt rather than the presumption of innocence. This however is not true; on the contrary the rule is that a defendant must be shown to be guilty beyond all reasonable doubt, or he is to be released. The reasonable doubt however is not permitted to encumber or fetter the court and the officers sitting as the Court are only controlled by their common sense in deciding what is a reasonable doubt, subject only to review.

The procedure in matters coming before "Boards" is left entirely for the discretion of the officers forming the Board. All evidence, hearsay, secondary and otherwise is admitted and considered, due weight being given same according to its character.

There are two unusual positions in the court machinery of the military courts which require legal skill. First there is the position of Judge Advocate. The Judge Advocate is both prosecuting attorney and amicus curiae. He conducts the trial as an ordinary prosecutor would and yet if the defendant has no counsel he looks after the interest of the defendant, and he advises the court on various questions. The other position is that of "Law Member" on a General Court-Martial. The law member is supposed to be a lawyer and he passes on all questions of law. As to questions arising in a trial and with reference to the admissibility of evidence the ruling of the law member of the Court is final. On all other interlocutory questions his ruling is final unless there is an objection from

a member of the court, in which event the Court goes into executive session and votes on the question, a majority ruling.

The matter of the proper uniform to be worn by members of a Court-Martial and counsel is given considerable attention in the Army. It is highly improper for any member of a Court to appear in other than full dress uniform. This is more after the custom in the Federal Courts than our state courts. The convening of the Court is very formal, the court and all officers being sworn. After this however the procedure is rather informal.

Some outstanding features of the rules in Courts-Martial are to be seen in the fact that defendants are probably held to a more strict accountability in these courts than in Civil courts. For instance a soldier who loses some of his clothing or equipment will not only be held liable civilly but is liable to criminal punishment for losing the property even though the loss may have been merely the result of ordinary rather than gross carelessness. This would seem revolutionary in our courts. However the difference is really in the regulation itself rather than the court which is hearing the case.

The regulations with reference to the C. C. C. men is entirely in their favor. They cannot be held civilly liable as soldiers can, and the military officers in charge of the C. C. C. camps are charged with the responsibility of all property at the camps, and have to answer strictly for the same; without having any right to hold the C. C. C. enrollees liable for any losses of Government property. They can be held liable for the articles which are issued to them such as clothing, but not for the equipment about the camp which is used in the daily routine. This places a considerable responsibility on the officer in command of the camp, for he must keep track of all equipment, tools, etc., and account for the same at the end of his tour of duty.

To try cases in military courts it can be truly said that it is not necessary to know any law at all; the officer can (and usually does) take the Manual and from the forms in same proceed to dispose of the case with nothing to guide him but common sense. If he follows the forms laid down in the manual and makes up his report of the trial in quadruplicate, sending three copies to his headquarters and retaining one copy in his files he is through with the matter. As stated at the outset; it reduces itself to a matter merely of filling out the "forms."

THE UNCONSTITUTIONALITY OF THE ANTI-DUELLING ACT OF MISSISSIPPI

J. B. Hutton, Jr.*

Recently a pauper sued a man of modest means for damages for an alleged slander. The action was based on the anti-duelling act, Section 11 of the Mississippi Code Annotated of 1930. The pauper's suit, on the merits, was hopeless. The court, however, in conformity with the express requirement of the anti-duelling act that a jury should not be precluded by ruling of law from passing on cases based on the act, refused to withdraw the case from the consideration of the jury. The jury awarded the pauper three thousand five hundred dollars damages. The Supreme Court of Mississippi reversed the judgment and dismissed the suit.[1]

Since the Supreme Court had power to rule on the merits of the case, it seems the trial court had the same power also, and could have given relief to the defendant without subjecting him to the delay, the anxiety and the expense of an appeal against one who had taken the pauper's oath. At some future time the question must be decided, the extent of judicial power must be marked out and the provinces of court and jury must be defined in actions brought under this anti-duelling act.

If the power of courts to prevent or reverse arbitrary and unreasonable findings of juries is to be preserved, and if the balance between the court and the jury is to be maintained as at common law and according to the Constitution of the State of Mississippi, the act must be declared void outright as infringing the judicial power given to the courts by the Constitution, or the act must be nullified by subtlety, in interpreting it, and its express prohibition of the exercise of judicial power in slander suits left meaningless.

As far as litigants are directly concerned, it is immaterial by which of these two methods the judicial power is kept intact, provided it is understood by trial courts that the power is intact and is available for relief in proper cases.

But from the lawyer's point of view, and for the ultimate good of all citizens, it is very desirable not only that the full power of the courts to administer the law be preserved and that legislative attempts to annul the constitutional grant of judicial power be frustrated, but also it is

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[1]Cooper v. Davidson, ... Miss. ....., 157 So. 418 (1935).

to the interest both of the profession and of the public that respect be shown the rules of construction of statutes according to the normal and conventional meaning of words. Hence instead of twisting words in the anti-duelling act from their usual meaning, and instead of ignoring the context of the statute, in order to preserve the anti-duelling act, the court should hold the act entirely void as infringing the undoubted grant of judicial power to the courts because, when the act is interpreted by the usual rules of construction, it does strike at this judicial power and therefore is invalid.

If the legislature wishes to enact a statute making insults actionable, it may do so, of course, whenever it will, provided the statute is consistent with the exercise of the powers granted the courts by the Constitution.

The authorities relating to the powers of our courts under our Constitution and to the unconstitutionality of such acts as Section 11 of the Code of 1930 are presented in this article in order that attention may be called to the invalidity of the act. It is hoped that the act will be attacked in future litigation of cases based on the act and that the common law power of the court to rule on actions of slander will be preserved.

I maintain that the act, when interpreted fairly and naturally, forbids courts to withdraw cases of alleged insults, based on the act, from the jury; that the act is an entirety, as shown by its express intention and requirement that the court should have no jurisdiction over insults, with a single exception; that the Constitution vests in the courts the power exercised at common law withdrawing unfounded complaints of slander from the juries; that the Mississippi decisions, as distinguished from dicta, have upheld in effect this judicial power; and that the act is unconstitutional and void because as an entirety it attempts to destroy the judicial power granted to the courts by the Constitution of the State of Mississippi.

It is proposed to discuss the construction of the act, the construction of Article Six of the Constitution, the state of the law in Mississippi relating to the act, and the invalidity of the act.

I

Construction of the Anti-Duelling Act

The anti-duelling act, Section 11 of the Mississippi Code Annotated of 1930, is as follows:

> "All words which from their usual construction and common acceptation are considered as insults and calculated to lead to a breach of the peace shall be actionable; and a *plea, exception,* or *demurrer shall not be sustained to preclude a jury from*

> *passing thereon,* who are the *sole* judges of the damages sustained; *but* this shall *not deprive* the courts of *the power* to grant new trials *as in other cases.*" (Author's italics)

The anti-duelling act attempts to take away from the courts the judicial power given them by Article Six of the Constitution of 1890 inherent in common law courts to determine whether a cause of action is stated or proved.

The act expressly forbids an appeal from the jury to the court on the question of actionability of words alleged to be insulting within the act by forbidding all modes of invoking the aid of the court, namely, demurrer, plea, and exception, either in the broad sense of this latter word as indicating an exception to a ruling of law on motion of counsel, or in the sense of exceptions to evidence. The act forbids the court from ruling on the actionability of words complained of as insulting. It is expressly enacted that the jury shall not be precluded by the court from passing on cases based on the act. The court is merely left the power to give a new trial. Only two new trials may be granted in this state. Thus the necessary affect of the act is to make the jury immune from the exercise of judicial power, and judicial power is placed directly and exclusively in the hands of the jury. This is a violation of Article Six of the Constitution of 1890.

The word "preclude" means to shut out, hinder by excluding, prevent, impede, prevent by anticipative action, hinder the action of.[3] Only by violence to language can the act be construed not to forbid the exercise of judicial power by the court. Beside the prohibition against precluding the jury from passing on cases based on the act, the context also indicates that the legislative intent was that the court should not exercise its common law powers in actions of slander. For, the act provides further that the jury are to be the "sole" judges of the damages. This provision is a further limitation on judicial power. After this limitation the legislature added the significant words, "*but* this shall *not deprive* the *courts* of the *power* to grant new trials *as in other cases.*" (Author's italics)

In adding this qualifying statement the legislative intent to limit judicial power is made clearer by showing that judicial power was the subject under consideration, was restricted, and that the restriction was subject to one exception.

The language and the necessary effect of the content of the enactment indicates this fact.

After forbidding the court to exercise its common law powers to preclude a jury from passing on unfounded complaints of slander the

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[3] 6 CENTURY DICTIONARY (1899) 4679, column 3.

statute provides "*but* this shall not *deprive* the *courts of* the *power* to grant new trials as in other cases."

Wherein consider: the word "but," used after a prohibition of the exercise of power to preclude juries from passing on the alleged slanders under the act, is used in the following senses:

1. However; yet; still; nevertheless; notwithstanding: introducing a statement in restriction or modification of the preceding statement.
2. On the contrary; on the other hand: the regular adversative conjunction, introducing a clause in contrast with the preceding.[8]

Therefore, the clause preceding the "but" clause was meant to restrict judicial power. The express mention of power of courts in the final clause beginning with the word "but" shows that judicial power was the subject under consideration. This power was limited expressly except in a single instance, namely, where new trials were sought.

Another result of the express prohibition of the use of judicial power, and the permission of the last clause to use it in a single instance is that it appears that the legislative design was that courts should under no circumstances exercise jurisdiction over slanders of the class made actionable by the act. In the words, the phrasing of sentences and the necessary effect of the substance of the act this intent is clearly shown. Hence it is impossible to separate any part of the act from the prohibition of the exercise of judicial power therein. The act is an entirety, and the invalidity of the prohibition of the exercise of judicial power is fatal to the entire act.

It is idle to speculate why the legislature a century ago saw fit to pass this law forbidding courts to preclude juries from passing on causes based on the anti-duelling act. Who can say whether the legislature was anxious to prevent courts from applying literal and dispassionate rules of construction to determine the meaning of words alleged to be offensive to the ears of gentleman a century ago, as staining their honor, in the belief that judicial construction of alleged insults would render non-actionable words that, by the code of the gentleman, were deadly insults? Why the legislature wished juries to pass on these delicate questions, to the exclusion of the courts, is immaterial. It is true the problem was one affecting the peace of the state. It is possible that the policy was hit on as one that would tend to reconcile gentlemen to the law requiring them to refrain from taking life, and would induce them to submit to the decision of juries of their peers. All these things are beside the point. The validity of the act turns not on a question of policy but on a question of power.

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[8] 1 CENTURY DICTIONARY (1899) 735, 2 and 3.

The fact is the legislature forbade courts by any means whatever to preclude juries from passing on alleged insults. The law is that the act is invalid because it infringes judicial power.

II

Judicial Power

Article Six, Section 144, of the Constitution of 1890, in providing that "The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in the constitution," gave to the courts those powers they had at common law regarding actions of slander, and other actions also. And an act of the legislature which attempts to cut down this power is void.

1. All judicial power is vested in the courts.

In the case of *Natchez & S. Ry. v. Crawford*[4] it was contended that Section 2, Chapter 135, page 125 of the Acts of 1925, which enacted that "all questions of negligence and contributory negligence shall be for the jury to determine," was unconstitutional because it placed judicial power exclusively in the hands of the jury. The court held that the act was constitutional inasmuch as it did not place judicial power exclusively in the hands of the jury. The court stated that an act which takes away from the court its common law powers is invalid, but that the contributory-negligence act did not take the power away and therefore was valid. The statement that a statute is invalid which takes away judicial power is the correct statement of the law. The constitution granted the power, and it follows that a statute cannot take it away. This has been held in subsequent cases. As the most concise and adequate statement of the law the following excerpt from Judge Anderson's opinion in *Natchez etc. Ry. v. Crawford, supra,* is given:

> "It is argued on behalf of the appellant that the statute in question confers judicial power on the jury and for this reason is unconstitutional. It will be noted that Section 2 of the act provides that 'all questions of negligence and contributory negligence shall be for the jury to determine.' If that were the proper construction (that it confers such power) it would undoubtedly be violative of the constitution; for, by Article Six of the Constitution of 1890 all judicial power in the state is vested in the Supreme Court and in the Circuit and Chancery Courts and in the courts of the Justices of the Peace, and in such other inferior courts as the legislature may from time to time establish. And the common law jury, guaranteed by Section 31, is a jury with power alone to try issues of fact, and not of law. It is clearly not within the legislative competence under these

[4]99 Miss. 697, 55 So. 596 (1911).

provisions of the Constitution to invest juries with judicial power,—that is, power to determine issues of law.

"'When the Constitution therefore vested in certain courts judicial power in matters of law, this would be construed as vesting such power as the courts under the English and American system of jurisprudence had always exercised in that class of actions . . . The powers of the court and jury in the administration of the law in these respects were distinct and were defined at the time of the adoption of our Constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action (to the extent of impairing in any degree the judicial power).'

"The Court has the power which cannot be taken from it to determine the legal sufficiency of the evidence as tending to establish negligence or contributing negligence."

In referring to Article Six of the Constitution of 1890 the Supreme Court stated in *Brewer v. Browning*,[5] "It will be noted from these provisions that the entire judicial power of the state is vested in the Supreme Court and such other courts as are provided in the Constitution."

The content of the expression "judicial power" is determined by reference to the power of courts at common law. "The rule announced by the common law of England, even though decided since the Revolutionary War, may be taken by us as at least a 'friendly guidepost our wandering steps to guide'."[6]

Again, a statute, Section 4910 of the Code of 1906 of Mississippi, which forbade courts to exercise their common law power of entering remittiturs where excessive damages have been awarded, is unconstitutional because it infringes "judicial power."[7]

2. At common law the court ruled on the actionability of the words alleged to be slanderous as a matter of law. "In actions for defamatory words, it is undoubtedly a question of law whether given words are or are not actionable . . . Moreover, in all actions for defamation, whether by way of slander or by way of libel, a long series of decisions has established the circumstances under which blame is admissible."[8]

"It has been stated again and again, and is not in dispute, that the question for the judge to decide is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury, if the judge so rules, to say whether it has that meaning."[9]

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[5]115 Miss. 358, 76 So. 519 (1917).
[6]Richardson v. Sims, 118 Miss. 728, 80 So. 4 (1918).
[7]Y. & M. V. Ry. v. Wallace, 96 Miss. 609, 43 So. 469 (1907); N. O. G. N. Ry. v. Frazer, 158 Miss. 407, 130 So. 493 (1930)
[8]2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 357.
[9]Tolley v. Fry (1931) House of Lords, A. C. 333, 145 L. T. 1.

"The court has the right and the duty to hold a check upon the action of jury in such matters, and to see that the defamatory inference is one which, without doing violence to the language, can be reasonably drawn. . . . From the earliest times it has by the law of England been the province of the court to say whether words published in writing were libel or not."[10] And so of actions of slander.[11] Likewise in criminal actions.[12]

The following authorities demonstrate that common law courts in actions of libel and slander had the power to determine whether a cause of action was alleged and proved. Limitations of space prevent the agreeable task of discussing the cases and setting forth the pertinent passages from the opinions:

Baylis v. Lawrence (1840) 11 Ad. & E. 120; 4 Jurist 652; *Permiter v. Coupland* (1840) 6 M. & W. 104, 151 Eng. Rep. Full Reprint 340; *Sturt v. Blagg* (1847) Exch. Chamber, 10 Q. B. 906; *Wright v. Clements* (1820) K. B.; *Wood v. Brown* (1815) 6 Taunt 168, 128 Eng. Rep. Full Reprint 998; *Gutsole v. Mathers* (1836) Exch. 1 M. & W. 495, 150 Eng. Rep. Full Reprint 530; *Newton v. Stubbs* (1685) K. B.; *Capel v. Jones* (1847) Ct. C. P.

Hence it follows that the common law power of courts to determine whether words are actionable was included in the grant to our Courts by the Constitution, Article Six, of "Judicial Power." An Act of the Legislature cannot lawfully impair or take away from the courts this power.

III

State of the Law in Mississippi

Insofar as the matter has been decided, there is no ruling directly upholding the anti-duelling act in its restrictions on the judicial power. But on the contrary, the effect of the rulings has been to disregard the restrictions. In no case that the writer has found has the constitutionality of the act been discussed, or the point made that the act is invalid. Even were this not true, it is an established principle that a constitutional question is not finally decided until it is decided correctly. Hence it is believed that the question is still open.

1. Contrary Dicta Discussed.

The following three cases, *Hodges v. Cunningham*,[13] *Davis v. Woods*,[14] and *Landrum v. Ellington*,[15] are cited to show that there is no

[10]Capital and Counties Bank v. Henty (1882) House of Lords, 47 L. T. 662.
[11]Simmons v. Mitchell (1880) Privy Council, 6 App. Cas. 156.
[12]King v. Shipley, 4 Dougl. 73, 99 Eng. Rep. Full Reprint 774; Fox's Libel Act, 32 Geo. III, c. 60, vol. 37 (1792); Hearne v. Stowell, 12 A. & E. 718, 40 Eng. Rep. Full Reprint 168; King v. Burdette (1820) K. B., 4 B. & Ald. 94, 106 Eng. Rep. Full Reprint 873 at 877; Oakes v. State, 98 Miss. 80, 54 So. 79 (1910).
[13]160 Miss. 576, 135 So. 215 (1931).
[14]95 Miss. 432, 48 So. 961 (1909).
[15]152 Miss. 569, 120 So. 444 (1929).

ruling of the Supreme Court of Mississippi directly upholding the anti-duelling act in taking away the judicial power in any case where there was afforded an opportunity for the exercise of the power. In none of these cases was the constitutionality of the act assailed, and there is no ruling on the validity of the act as an entirety.

In the first case the defendant said the plaintiff's statements were "more poisonous than an outright falsehood" and that the plaintiff was "worse than shady in his motives, and insane." In the second case, the defendant said to the plaintiff, "What in the God damned Hell are these infernal lies you have been circulating on me." In the third, the defendant called the plaintiff a thief and a perjurer.

It is submitted that in none of these cases was there an opportunity for the exercise of judicial power of withdrawing the cases from the jury as incapable of supporting a defamatory sense. There was no possible occasion for the exercise of judicial power. The absence of a ruling does not indicate that the anti-duelling act is valid or that its prohibition of the exercise of judicial power was upheld. The point was not discussed at all. Hence the cases are not of any weight as holding that the act is separable and that insults are actionable even though the restrictions on judicial power are invalid. In fact in the third case the court stated that the jury is subject to restriction. The court stated, "Under this statute, *within reasonable bounds,* the jury was the sole judge of the damages sustained . . ." (Author's italics)

2. Persons to Whom the Act Applies Is a Matter of Law, for the Court.

In the following two cases, *Dixie Fire Insurance Company v. Betty*[16] and *Neely v. Payne*,[17] the court exercised judicial power by determining the scope and orbit of the anti-duelling act, holding that its purpose was not to create a cause of action on actionable words against corporations or principals for insults spoken by their agents. In so doing the court determined whether the declaration stated a cause of action against those persons defendant, regardless of the prohibition of the statute against precluding the jury to pass on alleged insults. Judicial power is paramount, the statute notwithstanding.

3. Judicial Power to Determine the Existence of Privilege, and its Incidents Has Been Preserved in Mississippi, Despite the Act.

The power of the court at common law to determine the existence of privilege, and to withdraw the case from the jury unless evidence of actual malice was introduced by the plaintiff has been preserved in

[16]101 Miss. 880, 58 So. 705 (1912).
[17]126 Miss. 854, 89 So. 669 (1921).

Mississippi. The anti-duelling act makes no exception in favor of this power, the power to grant new trials alone being excepted from the operation of the restrictions imposed by the act on judicial power. Hence, the decisions of the Supreme Court of Mississippi, in preserving judicial power in matters of privilege has tacitly nullified the anti-duelling act in cases involving privilege. Again judicial power is paramount. And the effect of these rulings is to show the invalidity of the restrictions on judicial power. If the restrictions are invalid in one instance, they are invalid in every instance in which an occasion for the exercise of judicial power is presented.

In *Dedeaux v. King*,[18] and in *Verner v. Verner*,[19] the Supreme Court of Mississippi sustained demurrers to declarations based on the anti-duelling act on the ground that a case of privilege was shown and that this was a valid defense, and one on which the court could pass. Now the statute expressly forbids demurrers to cases stated under the act. Hence the effect of these cases is to overrule the restrictions imposed on judicial power by the anti-duelling act.

Similarly, in *Sands v. Robinson*,[20] and in *Winton v. Patterson*,[21] judicial power was asserted. Both these cases were based on the anti-duelling act. In the first a new trial was given, and in the second a verdict for the plaintiff was reversed and a judgment for the defendant was rendered in the Supreme Court of Mississippi because privilege was shown, and this was held to be a complete defense as a matter of law.

In *Hardtner v. Salloum*,[22] and in *Cartwright & Caps v. Kaufman*,[23] judicial power in actions for common law slander was asserted and the Supreme Court of Mississippi held that demurrers should be sustained in actions of slander where privilege appears. Hence, again, the judicial power to rule on privilege existed by the common law, and a legislative act cannot deprive courts of these common law powers which the Constitution vests in them.

In the recent case of *Cooper v. Davidson*,[24] the Court followed the case of *Winton v. Patterson, supra,* and held that the court has power to exercise judicial power in cases based on the act where privilege appears as a defense. In this case the invalidity of the anti-duelling act was briefed and argued. The decision was based on the single ground that privilege is within the judicial power under the ruling of *Winton v. Pat-*

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[18] 92 Miss. 38, 45 So. 466 (1907).
[19] 64 Miss. 321, 1 So. 479 (1887).
[20] 12 S. & M. 704 (1849).
[21] 152 Miss. 158, 119 So. 161 (1928).
[22] 148 Miss. 346, 114 So. 621 (1927).
[23] 113 Miss. 359, 74 So. 278 (1917).
[24] ..... Miss. ....., 157 So. 418 (1935).

terson. It was not necessary, for the ends of justice, to go further; and, in accordance with the policy and rule, the Court did not declare the act invalid, since the former rulings on privilege furnished ample means of disposing of the case without holding the entire act invalid. The court did not express any opinion as to the rationale of the *Winton v. Patterson* case. It is believed, however, that the pronouncements and decisions of the court in the other cases, set forth above, give the correct reason for preserving judicial power at the expense of the restrictions attempted to be imposed on it by the anti-duelling act.

IV

Conclusion

Article Six of the Constitution of 1890 vests in the courts the powers of courts at common law in cases of slander. The anti-duelling act attempts to strip courts of this power. The act is an entirety. The legislative intent in making insults actionable was clearly shown to be that courts should never exercise their constitutional powers in such cases. The act as a whole cannot be upheld without violating the Constitution. The act cannot be upheld in part without violating the intention, manifested in the act, of the legislature. Hence the act is entirely invalid.

It is to the interest of the profession and of the public that the constitutional powers of the courts to administer the law be preserved, and that the true reason for preserving this power, called judicial, be given. Arbitrary rules of construction should not be resorted to. This makes for trouble in the future, by cluttering up the law with irrational rubbish.

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NOTE AND COMMENT

CONCLUSIONS DERIVED FROM TREATY CASES DECIDED BY THE UNITED STATES SUPREME COURT

Practically all the cases decided by the Supreme Court involving treaties have dealt with private rights arising under the treaty. Before the Court will construe the treaty there must be a *bona fide* dispute, and the decision is binding only upon the parties to the litigation. As applied by the Court the treaty is an international compact forming part of the municipal law of the United States. The treaty cases may be summarized as follows:

In answer to the question, what is a treaty? one finds no complete definition in the decisions of the Court, although on occasion the Court has defined the term in the light of the facts of the particular case. In several instances a treaty was called a "law made by the proper authorities."[1] Treaties are also continually referred to as contracts, and in some decisions have been compared with contracts in private law. In *Sullivan v. Kidd*[2] the Court examined the treaty of 1899 with Great Britain as closely as if it had been a contract in private law and made a restrictive interpretation of the applicable provision. It appears that in at least one case the Court has recognized that an executive agreement has the force of a treaty even though it is not one in the technical sense.[3] The question may be asked, when does an agreement become a treaty? Although certain definite constitutional requirements must be fulfilled, the Court has always accepted as a treaty whatever is so designated by the political departments. It appears that a treaty must be proclaimed before it will have the force of law. In *Haver v. Yaker*[4] the Court held that individual rights arising under a treaty ran from the date of proclamation; a construction conforming to a previous opinion of the attorney-general,[5] and later incorporated by implication in an act of Congress. No treaty has ever been declared invalid on the ground that the treaty-making power had exceeded its authority. From a study of the decisions it seems that the only limitation on this power is the Constitution itself. Moreover, the treaty-making power on occasion has been held to be broader than the authority possessed by Congress, for in *Missouri v. Holland*[6] the Court held that a treaty may serve as a basis for extending the powers of Congress.

Briefly stated, the position which treaties occupy in the system of law of the United States is as follows: If there is a conflict between a treaty

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[1] Lenoir, *Treaties and the Supreme Court* (1934) 1 U. OF CHI. L. REV. 602, 603-605.

[2] 254 U. S. 433, 41 Sup. Ct. 158, 65 L. ed. 344 (1921).

[3] Altman & Co. v. United States, 224 U. S. 583, 32 Sup. Ct. 593, 56 L. ed. 894 (1912).

[4] 9 Wall. 32, 19 L. ed. 571 (1869).

[5] 6 Ops. Atty. Gen. 748-750 (1854). See WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS (1922), 255.

[6] 252 U. S. 416, 40 Sup. Ct. 382, 64 L. ed. 641 (1920).

and an act of Congress the one of later date prevails.[7] The Constitution is considered as supreme over both, although there is no case in which a treaty has ever been held invalid on the ground that it violated the Constitution. Treaties, like acts of Congress, are supreme over state laws.

Although these rules are well established it is not always easy to determine whether a treaty actually conflicts with national or state laws. As regards acts of Congress the Court has clearly favored statutes later in date than the treaty, but it is doubtful whether it will so readily apply a treaty alleged to be in conflict with a posterior statute. Instead, it will try as far as possible to reconcile the two.

Decisions of state courts upholding the validity of state laws which appeared to be in conflict with a treaty are rarely affirmed by the Supreme Court. Yet such was the case in *Rocca v. Thompson*[8] where the Court declared that the administration of estates comes within the province of state law and that it was not the purpose of those who signed the treaty to take this right from the state. Had the words of the treaty been clear upon this point, however, the Court would no doubt have upheld the treaty. *Todok v. Union State Bank*[9] is equally unique in that the Supreme Court in this case regarded a state law more favorably than did the state supreme court. The state court had held the state law inapplicable on the ground of conflict with a treaty, but the Supreme Court reversed this decision, holding that there was no conflict. The Court has repeatedly declared that it is bound to apply treaties as municipal law without in any instance passing upon the question of the international obligation of the United States.[10] Yet no ruling which the Court makes on treaties can in any way relieve the nation of its international responsibility; this is a question not for the Court but for the political departments. Nor can the Court modify a treaty. Modification is a matter for negotiation between the parties.

The principal contribution of the Court to the international law on treaties has been with respect to treaty construction. It appears that in some instances the Court has laid down a policy for the particular case, in others it has construed treaties in the light of previous decisions, or in accord with general public policy. What general principles or rules of treaty interpretation have been formulated by the Court? Is there a rule of liberal construction? Such a rule has been frequently asserted by the Court, but at no time has the term "liberal" been clearly explained or defined. Does "liberal" mean a broad construction of the words of the treaty, or an interpretation favorable to the rights of the other contracting party? From an examination of the decisions it would seem that the Court uses "liberal" in the latter sense.

The alleged rule was first stated as dictum in *Ware v. Hylton*[11] and next appeared as a question in *Shanks v. Dupont*.[12] If there have ever

[7]The Cherokee Tobacco, 11 Wall. 616, 20 L. ed. 227 (1870); Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798 (1884).

[8]223 U. S. 317, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).

[9]281 U. S. 449, 50 Sup. Ct. 363, 74 L. ed. 956 (1930).

[10]See Botiller v. Dominguez, 130 U. S. 238, 247, 9 Sup. Ct. 525, 32 L. ed. 926 (1889).

[11]3 Dall. 199, 1 L. ed. 568 (1796).

[12]3 Pet. 242, 7 L. ed. 666 (1830).

been any cases in which the statement of the rule was other than mere dictum possibly they are *Tucker v. Alexandroff*[13] and *Jordan v. Tashiro*.[14] Yet in both cases it seems certain that the Court could have come to its decision without reverting to the so-called rule. Moreover, in certain cases, such as *Rocca v. Thompson*,[15] the Court has entirely disregarded the rule. If anything, this case was a liberal construction in favor of one of the states of the Union. In *Petersen v. Iowa*[16] the Court also made a construction favorable to state law and restrictive of the scope of the treaty provision. In two cases appealed from federal courts, the Supreme Court likewise narrowly construed the treaty, liberally interpreting an act of Congress. One may conclude that there is no rule of liberal interpretation which the Court is bound to apply, although the Court has, on occasion, construed treaties liberally in the interest of the other contracting party.

A controlling factor in the Court's interpretation of treaties has been the intention or purpose of the parties. The intent may be clear upon the face of the treaty, but more often the Court must look to such evidence of intention as the *travaux preparatoires,* the historical background of the treaty or the later official correspondence of the parties. Only such intention as the words or acts of the parties indicate are taken into consideration—no account can be taken of intentions secretly cherished. Sometimes from the evidence it appears that the intentions of the two parties are in conflict or inconsistent. There is no uniform rule which the Court will apply in such a case.

The principle that treaties must be construed in the highest good faith is another way of saying that the Court will follow the intention or purpose of the contracting parties in so far as that can be ascertained. In *Shanks v. Dupont*,[17] Justice Story placed a favorable construction on the rights of the British subjects because he thought such was the intent of the parties. In *Tucker v. Alexandroff*[18] the Court said that international comity required that a treaty be interpreted in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose. Is the application of the good faith principle the same thing as applying a "rule" of liberal construction, that is, construing treaty provisions broadly in the interest of the other contracting party? An examination of *Terrace v. Thompson*[19] shows the answer to be No. In that case the Court examined the circumstances under which the treaty was signed and also the later diplomatic correspondence between the two governments in order to discover the intention of the parties. This evidence was a controlling factor in the decision, but, according to the Court, did not support a broad construction of the treaty provisions.

In a number of cases in which the intention of the other contracting party was not clear, the Court has decided in favor of the United States. Was this contrary to an international good faith policy? In *Rocca v.*

[13] 183 U. S. 424, 22 Sup. Ct. 195, 46 L. ed. 264 (1902).
[14] 278 U. S. 123, 49 Sup. Ct. 47, 73 L. ed. 214 (1928).
[15] 223 U. S. 317, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).
[16] 245 U. S. 170, 38 Sup. Ct. 95, 62 L. ed. 225 (1917).
[17] 3 Pet. 242, 7 L. ed. 666 (1830).
[18] 183 U. S. 424, 22 Sup. Ct. 195, 46 L. ed. 264 (1902).
[19] 263 U. S. 197, 44 Sup. Ct. 15, 68 L. ed. 255 (1923).

Thompson[20] and *Petersen v. Iowa*[21] the Court attempted to reconcile a state law and a treaty, declaring that there was no conflict between the two, thus restricting the scope of the treaty provision. In *Liberato v. Royer*[22] an amendment to a treaty was narrowly construed as compared with a state law. In *Todok v. Union State Bank*[23] the Supreme Court held a treaty provision inapplicable in deference to a state law on homesteads which, according to the Court, was in accord with the accepted policy of nearly all states on this matter. Apparently, in these cases, the Court has adopted the policy that when there is an apparent conflict between a treaty and a state law, the statute should be upheld if it follows generally accepted public policy and if it does not directly conflict with the treaty provisions. The Court will not usually construe a treaty so as to invalidate rights clearly reserved to the state.

In the majority of cases, however, the Court has not only asserted the policy of international good faith, but the decisions are clearly in accord with that policy. Thus, in *Charlton v. Kelly*[24] the Court declared a treaty provision to be binding upon the United States even though it was not observed by the other contracting party. In that case the Court attached great weight to the policy followed by the executive. *Cook v. United States*[25] is also a good illustration of a decision interpreting a treaty in the best of faith. Although the rule of liberal construction was not asserted, the Court recognized that a treaty is an instrument to be applied in such a way as to carry out the apparent intentions of the contracting parties. The Court declared that a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

In *The Pigeon River Improvement, Slide and Boom Co. v. Cox*[26] it might seem the Court laid down yet another principle of treaty interpretation, namely, that it must follow the "practical construction" which has been given a treaty. Since this construction had been made by an act of Congress, and was recognized by a later treaty the Court had very little choice in the matter. It did state, however, that the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.

If there is any rule of treaty interpretation considered binding by the Court it would seem to be that treaties must be construed according to the purpose or intent of the contracting parties. If this intent is not clear on the face of the treaty the Court may examine the preparatory work, diplomatic correspondence or the surrounding circumstances in order to ascertain the purpose of the parties.

There have been two important Supreme Court decisions involving the question of the effect upon a treaty of a war between the contracting parties, although in the first case, *Society for Propagation of the Gospel*

[20]223 U. S. 317, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).
[21]245 U. S. 170, 38 Sup. Ct. 95, 62 L. ed. 225 (1917).
[22]270 U. S. 535, 46 Sup. Ct. 373, 70 L. ed. 719 (1926).
[23]281 U. S. 449, 50 Sup. Ct. 363, 74 L. ed. 956 (1930).
[24]229 U. S. 447, 57 L. ed. 1274 (1913).
[25]288 U. S. 102, 53 Sup. Ct. 305, 77 L. ed. 641 (1933).
[26]291 U. S. 138, 54 Sup. Ct. 361, 78 L. ed. 695 (1934). See Note (1934) 7 Miss. L. J. 197.

v. New Haven,[27] this was not the basic question before the Court, in that case the actual holding was that property rights vested under a treaty are not altered by a subsequent war between the contracting parties. By way of dictum, however, the Court expressed certain views as to the effect of war upon treaties. It stated that war did not ipso facto extinguish all treaties, but that some were merely suspended while the war lasted. In this category were treaties which stipulated for permanent rights and arrangements, or which, in their terms, were meant to provide for the event of an intervening war.

In *Karnuth v. United States*[28] the Court held that Article 3 of the treaty of 1794 "by its very nature" and in accordance with the intention of the parties was abrogated by the War of 1812. Since the Immigration Act of 1924 was in direct conflict with the article, the view of the Court was no doubt governed by the political departments. The holding of the Court could scarcely have been otherwise, but its reasoning was poor. In fact, these two cases have contributed very little to the solution of the question of the effect of war upon treaties. The Court recognized that not all treaties are abrogated by war, but it has never decided exactly what kind of treaties survives.

JAMES J. LENOIR

[27]8 Wheat. 464, 5 L. ed. 662 (1823).
[28]279 U. S. 231, 49 Sup. Ct. 274, 73 L. ed. 677 (1929).

THE POWER OF CONGRESS TO LIMIT THE JURISDICTION OF DISTRICT COURTS

The seventy-third Congress passed an act amending Section 24 (1) of the Judicial Code[1] by adding to it the following provisions: "No district court shall have jurisdiction of any suit to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commissions of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state." The purpose of this article is to discuss the constitutionality of this act.

The first question to be considered is the power of Congress to deprive the federal courts of jurisdiction on the ground of diversity of citizenship of the parties. The Constitution provides:[2] "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." And again: "The judicial power shall extend to all cases in

[1]Title 28 U. S. C. A., § 41 (1).
[2]Art. III, § 1.

law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under this authority . . . to controversies . . . between citizens of different states."[3]

These constitutional provisions have been construed to mean that only the jurisdiction of the Supreme Court is conferred directly by the Constitution.[4] The jurisdiction of inferior federal courts is not derived directly from the Constitution; that instrument only gives the courts power to take jurisdiction, and an act of Congress is required to confer it.[5] Although the contrary view was expressed at an early date,[6] it is now well established that Congress is not compelled to confer upon some federal court jurisdiction of every case enumerated in the constitutional grant of judicial power.[7] Consequently it has been held that the right of a litigant to maintain an action in a federal court on the grounds of diversity of citizenship is not one granted by the Constitution.[8] The court, in this case, said: "The Constitution simply gives to inferior courts the capacity to take jurisdiction in enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part."[9] This doctrine seems to have been established also in earlier cases decided by the court.[10]

Generally, the power of Congress over the jurisdiction of inferior federal courts is almost supreme. A federal district court cannot take jurisdiction over any case, civil or criminal, where it has not been authorized to do so by an act of Congress.[11] That body in creating the district courts could prescribe the extent of their jurisdiction, and withhold jurisdiction in the case of a particular controversy.[12] It has even been said that the entire jurisdiction of inferior federal courts is "within the unfettered discretion of Congress."[13]

It may be carrying this principle too far, however, to say that Congress may deny to a particular class of litigants the right, in certain cases, to resort to federal courts where a federal question is involved in the controversy. This is precisely what the statute under consideration attempts to do. It deprives utilities of the right to restrain the enforcement or operation of a rate order "because such order is repugnant to the Constitution of the United States." The asserted violation of a person's rights under the Constitution, when the determination of those rights requires an interpretation of the Constitution, raises a federal question.[14] The

[3]Art. III, § 2.

[4]Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, 43 S. Ct. 79, 24 A. L. R. 1077 (1922).

[5]Kline v. Burke Construction Co., *supra*, n. 4; Sheldon v. Sill, 8 Howard 441, 12 L. Ed. 1147 (1850); Nashville v. Cooper, 6 Wall. 247, 18 L. Ed. 851 (1868).

[6]Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816).

[7]Assessors v. Osborne, 9 Wall. 567, 19 L. Ed. 748 (1869); Sheldon v. Sill, *supra*, n. 5.

[8]See Kline v. Burke Construction Co., *supra*, n. 4.

[9]See Kline v. Burke Construction Co., *supra*, n. 4.

[10]Nashville v. Cooper, *supra*, n. 5; Assessors v. Osborne, *supra*, n. 7.

[11]Assessors v. Osborne, *supra*, n. 7.

[12]Holmes v. Goldsmith & Co., 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118 (1893).

[13]Home Life Ins. Co. v. Dunn, 19 Wall, 214, 22 L. Ed. 68 (1874).

[14]Cohens v. Virginia, 6 Wheat 264, 5 L. Ed. 257 (1821); Starin v. New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388 (1885).

cases of which this statute deprives the district court of jurisdiction will practically all involve an asserted violation by the state of the due process or equal protection clauses of the Fourteenth Amendment. Such cases involve a federal question and are "cases arising under the Constitution of the United States."[15]

Congress, although it had the power to confer jurisdiction over cases arising under the Constitution, laws and treaties of the United States, on inferior federal courts, did not do so in the Judiciary Act of 1789.[16] It was conferred in 1801,[17] and this statute was repealed in 1802.[18] The power of Congress to vest this jurisdiction in federal courts was next exercised in 1875,[19] when such jurisdiction was expressly conferred. In the interval, parties claiming rights under the federal constitution and laws were restricted to state courts in the original pursuit of remedies, though they could appeal from the state courts to the United States Supreme Court.[20]

Since the enactment of the statute of 1875, however, the fact that a federal question is involved has been sufficient to confer jurisdiction upon federal courts aside from the citizenship of the parties.[21] Thus, it has been held that the sufficiency of rates with reference to the federal constitution is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature.[22]

Historically, because of the fact that for many years litigants were forced to pursue remedies in cases involving federal questions through the state courts, it might be said that particular classes of them may be compelled to do so today. Congress has virtually supreme power over the jurisdiction of inferior federal courts, as has been noted already. But will an arbitrary and unreasonable exercise of that power be sanctioned? Where a person's constitutional rights are invaded by the action of a state, he should be able to have redress in the federal courts. The question whether a person has been deprived of his property without due process of law is one which confers jurisdiction on a federal district court without regard to citizenship.[23] A federal court cannot, if properly appealed to, decline to take jurisdiction of a suit to enjoin enforcement of state statutes fixing gas rates which are asserted to violate the federal Constitution.[24] Should Congress have the power to deprive the court of jurisdiction when a public utility's rights under the Constitution are invaded, and reserve jurisdiction when similar rights of any other person are threatened?

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[15]Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382 (1909); Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. Ed. 341 (1898).

[16]1 STAT. 73, *et seq.*

[17]Act Feb. 13, 1801, C. 4, § 11, 2 STAT. 89.

[18]Act Mar. 8, 1802, 2 STAT. 132.

[19]Act, Mar. 3, 1875, C. 137 § 1, 18 STAT. 470.

[20]Eaton v. Calhoun, 47 F. 427 (1880); HUGHES, FEDERAL PRACTICE, § 534.

[21]Green v. Louisville & I. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917 E, 88 (1917).

[22]Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

[23]Brown v. Grant, 116 U. S. 207, 6 S. Ct. 357, 29 L. Ed. 598 (1886).

[24]Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382 (1909).

Another question arising in the discussion of this act is whether it is a violation of the guaranties included in the Fifth Amendment to the Constitution, in depriving the utility companies of their property without due process of law. The Fifth Amendment is a limitation upon the powers of the federal government, not being applicable to the states.[25] The Fourteenth Amendment was adopted in order to give the same protection against action of the various states. It reads in part: . . . "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Does a denial of the equal protection of the laws constitute a violation of the due process clause of the Fifth Amendment?

The Supreme Court has never given a definition of what constitutes a deprivation of property without due process of law.[26] The court has said:[27] "While this provision of this Amendment (Fourteenth) is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in the Magna Carta, and, in substance if not in form, in nearly or quite all the constitutions which have from time to time been adopted by the several states of the Union. By the Fifth Amendment it was introduced into the Constitution of the United States as a limitation upon the powers of the federal government, and by the Fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States." While this statement discusses the due process clause rather than the equal protection clause, it does illustrate the point that the Fourteenth Amendment was intended to apply the same restrictions against the states as the Fifth Amendment applies against the federal government.

There are conflicting statements on the direct question of whether the Fifth Amendment prohibits the federal government from denying the equal protection of the laws to persons within its jurisdiction. In the lower federal courts statements have been made that the prohibition does apply to the federal government. "It seems reasonably clear that the 'due process of law' provision of the fifth amendment is broad enough in its scope and purpose to include the 'equal protection of the laws' which no state may deny to any person under the provisions of the Fourteenth Amendment."[28] In the Lever Food Control Act, Congress made it a crime for any person to hoard or waste food, and then made an exception in favor of farmers and form co-operative associations (in which cases the same acts were not crimes). This act was held to be unconstitutional because it did not apply to all persons alike.[29] The Supreme Court, however, has said:[30] "The clause (equal protection) is associated in the amendment with due process, and it is customary to consider them together. It may be that they overlap, that a violation of one may at times involve

[25]In re Mahon, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1886); Smith v. Maryland, 18 How. 71, 15 L. Ed. 269 (1855).

[26]Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14 (1908).

[27]Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, 83 (1876).

[28]United States v. Yount, 267 F. 861 (1920).

[29]United States v. Armstrong, 265 F. 683 (1920), United States v. Yount, *supra*, n. 28, also involved the Lever Food Control Act.

[30]Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375 (1921).

the violation of the other, but the spheres of protection they offer are not coterminous. The due process clause, brought down from the Magna Carta, was found in the early state constitutions, and later in the Fifth Amendment to the federal Constitution, as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the Fifth Amendment, and so does not apply to congressional legislation." It should be noticed at this point that the statement of the Supreme Court is purely dictum, and was unnecessary to the decision of the case.[31] In the two cases decided by the lower courts, the principle of equal protection was the very basis for holding the Lever Act unconstitutional. Grave injustices would result in many instances if Congress be permitted to discriminate at will between persons, thus doing the very acts which the states are prohibited from doing.

Assuming, for the sake of argument, the the fifth amendment, under its due process clause, prohibits the federal government from denying equal protection, the next question is whether this statute does so. What is such a denial, and what amounts to an unjust discrimination has been the subject of great controversy. An exact definition of the "equal protection of the laws" probably could not be given, because each case involving this question must be decided largely on its own facts. However, certain principles have been established and followed.[32]

The Circuit Court has said:[33] "By equal protection of the laws is meant equal security under them to every one, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and the protection of his property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others in like circumstances." And again:[34] "The equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated . . . Neither can it make a classification of individuals which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the matters sought to be accomplished, the same conclusion of unconstitutionality is affirmed." Corporations are "persons" within the meaning of the equal protection clause.[35]

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[31]The case of Truax v. Corrigan, *supra,* n. 30, involved a state statute denying to an employer the right to an injunction, under the same circumstances as would affect other litigants, against acts of violence by striking employees. No powers of the federal government were involved; the question was one arising solely under the Fourteenth Amendment.

[32]In the discussion of what is a denial of equal protection, the cases referred to necessarily involve action of states. The same theory, however, would be applied to Congressional action.

[33]In re Grice, 67 F. 627, 645 (1897); this case was reversed on other grounds in Baker v. Grice, 169 U. S. 284, 18 S. Ct. 323, 42 L. Ed. 748 (1898).

[34]Atcheson, etc., R. Co. v. Matthews, 174 U. S. 104, 19 S. Ct. 609, 43 L. Ed. 909, 913 (1899).

[35]Pembina Consolidated Mining and Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 707 (1888).

Tested by these principles, it would seem that the statute in question denies to public utility corporations the equal protection of the laws. It arbitrarily selects a certain class of corporations—public utilities—and denies to them a right to be heard in federal court on rate questions, while the right so to be heard is enjoyed by all other litigants who may be seeking precisely the same remedies on the same grounds. In cases other than rate cases the utility companies may proceed in federal court either on the ground of diversity of citizenship or because a federal question is involved. Is this not the enaction of a law which denies to such companies the right to resort on the same terms with all other persons to the courts of the country for the protection of their property rights? If the equal protection clause applies to the federal government, this statute would seem to be a violation of it.

Should the constitutionality of this act be upheld, however, in Mississippi, and possibly in other states, the act might not apply. The jurisdiction of the federal district court to hear rate cases is reserved where there is not a "plain, speedy and efficient remedy" in the state courts. Exactly what is meant by a "plain, speedy and efficient remedy" has not yet been determined. The remedy in state courts might be plain and speedy, but is it efficient? The federal courts offer a more adequate remedy than is available in the state courts of Mississippi.

In this state a suit contesting the order of a rate-making body, or seeking an injunction against its enforcement, would be brought in the chancery court. In such an action there would be conflicting evidence as to the valuation of the utility's properties. The Supreme Court of this state, as an appellate court, does not review findings of fact by a chancellor where the evidence is conflicting, unless such finding is manifestly wrong.[36] When the evidence as to the value of property is conflicting, a master's report, confirmed by the chancellor, will not be disturbed on appeal.[37] In Mississippi, then, a litigant in such a case does not have the benefit of a review of fact as well as law on appeal.

In federal courts the litigant is entitled to a review of the questions of fact as well as law on appeal.[38] It has been held, too, in regard to state courts, that a utility, where the valuation of property is a question of fact, is, under the due process clause of the Fourteenth Amendment, entitled to the independent judgment of the state appellate court as to both law and facts upon review of rates fixed by a public service commission.[39] In this case, the state court had held that the findings of fact by the commission based on evidence to support them would not be reviewed. In reversing this decision, the federal Supreme Court held that

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[36]GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, § 674, note 7.

[37]Millsaps v. Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 547 (1899).

[38]28 U. S. C. A. § 375. It provides: "When an issue of fact in any civil cause in a district court is tried and determined by the court, without the intervention of a jury according to Section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

[39]Bluefield Waterworks, etc., Co. v. Public Service Commission, 262 U. S. 679, 67 L. Ed. 1178 (1923).

the utility was entitled to such review under the due process clause of the Fourteenth Amendment.

A state which denies a review of such facts certainly does not give an adequate remedy, at least in the constitutional sense. The only logical meaning of the word "efficient" as used in the statute is an adequate remedy. As a result, federal jurisdiction of rate cases might be retained in Mississippi because there is not a "plain, speedy and efficient remedy" in the state courts.

This discussion of the constitutionality of this statute, has involved the following questions:

1. The power of Congress to deny to a certain class of litigants the right to resort to federal court in one type of cases, (i. e. rate cases) where, (a) there is a diversity of citizenship, and (b) where a federal question is involved.
2. Whether Congress has the power to deny to persons within its jurisdiction the equal protection of the laws.
3. If the above question be answered in the negative, whether the effect of this statute is a denial of equal protection.
4. Whether the statute would apply in Mississippi on the ground that the state courts do not afford a "plain, speedy and efficient remedy."

These are interesting and current questions, and the bar probably will be eagerly awaiting a decision of the Supreme Court on the issues involved.

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DELEGATION OF LEGISLATIVE POWER

Section nine (c) of the National Industrial Recovery Act of June 16, 1933[1] provides: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of the state. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000.00 or imprisonment for not to exceed six months or both."

The validity of this section was attacked in actions brought by the Panama Refining Company and the Amazon Petroleum Corporation,[2] and the Supreme Court of the United States in a decision handed down January 7, 1935 held such section to be an unconstitutional delegation of legislative power to the President.

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[1] 48 STAT. 195, 200; 15 U. S. C. Tit. 1, § 709 (c); 15 U. S. C. A. § 709 (c).
[2] Panama Refining Co. v. Ryan and Amazon Petroleum Corp. v. Ryan, 293 U. S. ....., 55 Sup. Ct. 241, 79 L. ed. 223 (adv. sheet).

It is the purpose of this article to trace the policy of our government with reference to delegation of legislative power as reflected in the federal statutes and the decisions of the Supreme Court, and in the light of such policy to consider the decision in the cases above referred to.

Turning to precedents in legislation it is interesting to notice that during the administration of Washington, an act approved June 4, 1794, authorized the President, when Congress was not in session, and for a prescribed period, "whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States or the ships and vessels of any foreign nation, under such regulations as the circumstances may require, and to continue or revoke the same, whenever he shall think proper."[3]

Four years later Congress passed and President Adams approved an act prohibiting commercial intercourse with certain foreign countries and giving the President the right to suspend the operation of the act when, in his opinion, a certain stated condition existed.[4] Again in April 1806 an act was approved which made it unlawful to import goods from Great Britain into the United States and it was further provided: "That the President of the United States be and he is hereby authorized further to suspend the operation of the aforesaid act, if in his judgment the public interest should require it. . . ."[5]

Many other legislative acts might be cited,[6] showing how Congress has continually delegated power to the President, to cabinet members, and to various boards and commissions, and all are evidence of the fact that, in the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interest of our people, to invest the executive with large discretionary powers in matters arising out of the execution of certain statutes, especially those dealing with trade and commerce.

The constitutional validity of such legislation was first questioned in the case of *Brig Aurora v. United States* in 1813.[7] In that case it was strongly contended that to make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law, and such would be a transfer of the legislative power to the President. The Court did not go into a discussion of the question of delegation of legislative power, but simply held: "The legislature may make the revival of an act depend upon a future event, and direct that event to be determined by the President and made known by his proclamation."

The Supreme Court of Pennsylvania in an early case[8] involving the question of delegation of legislative power said, "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare

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[3] 1 STAT. 372 (1794).
[4] 1 STAT. 613 (1798).
[5] 2 STAT. 411 (1806).
[6] 3 STAT. 224 (1815); 3 STAT. 361 (1817); 4 STAT. 3 (1824); 4 STAT. 425 (1830); 14 STAT. 3 (1866); 26 STAT. 616 (1890).
[7] 11 U. S. 7, 7 Cranch 382, 3 L. ed. 378 (1813).
[8] Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716 (1873).

whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction laid down by the court was this: "The legislature cannot delegate its powers to make a law, but it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

One of the earliest cases in which the doctrine was fully discussed by the Supreme Court of the United States is *Field v. Clark*.[9] That case involved the validity of an act of Congress[10] which gave the President certain discretionary powers to suspend the duties to be placed on imports. The Court said, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. However, there can be no valid objection to conferring authority or discretion as to the execution of a law. Any number of statutes are in the alternative, depending on the discretion of some person to whom is confided the duty of determining whether the proper occasion exists for executing them. The exercise of such discretion is not the making of a law."[11]

Previous to this decision Mr. Chief Justice Marshall in the case of *Wayman v. Southard*[12] recognized the fact that no exact line had been drawn separating the important subjects which must be entirely regulated by the legislature itself from those of less interest "in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details." And with this in mind he said that although Congress can not delegate to the courts or to any other tribunal powers strictly and exclusively legislative, yet "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself, and the maker of the law may commit something to the discretion of other departments."

In 1899 Congress passed an act giving the Secretary of War the power to require the removal or alteration of any bridge which in his discretion he believed to be an unreasonable obstruction to free naviga-

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[9]143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1891).

[10]26 STAT. 612 § 3: "That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of Jan. 1892, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act, relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely . . ."

[11]31 L. ed. 310.

[12]23 U. S. 1, 10 Wheat. 1, 6 L. ed. 253 (1825).

tion.[13] It was necessary that notice be given and a hearing had, but the Secretary had the power of determining when the obstruction was unreasonable. The Union Bridge Company, a Pennsylvania Corporation owning a bridge across the Allegheny River, contested the validity of the procedure prescribed by this act.[14] The Court in holding the act to be constitutional cited *Brig Aurora v. United States*[15] and *Field v. Clark*,[16] and said, "It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon the officer, as the head of an executive department, powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts . . . That such an object (the removal of obstructions to navigation) was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit . . . As appropriate to the object to be accomplished, as a means to an end within the power of the national government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States were unreasonable obstructions to free navigation . . . By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress . . . In performing that duty the Secretary of War will only execute the clearly express will of Congress, and will not in any true sense exert legislative or judicial power."[17]

In a suit brought in 1907 a question was raised as to the constitutionality of the Safety Appliance Act of March 2, 1893.[18] The act pro-

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[13]30 STAT. 1121, Chap. 425 U. S. Comp. Stat. 3545 (1901): "Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States, is an unreasonable obstruction to free navigation of such waters on account of insufficient heighth, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of said Secretary of War, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonable free, easy, and unobstructed; . . ."

[14]Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523, (1906).

[15]*Supra* footnote 7.

[16]*Supra* footnote 9.

[17]As involving same statute see also Monogahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435 (1909). The Court reiterated the holding of Union Bridge Co. case and in regard to objection that the act of Congress gave the Secretary of War power which might be used arbitrarily said, "As to arbitrary use of the power so granted, suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for the acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

[18]27 STAT. 531 (1893), Chap. 196 U. S. Comp. Stat. 3174 (1901).

vided in substance that after a named date only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the American Railway Association and declared by the Interstate Commerce Commission.[19] The Court citing *Buttfield v. Strahan*[20] and *Union Bridge v. United States*,[21] held such a delegation of power to be constitutional.

The unconstitutionality of the Forest Reserve Acts[22] was urged as a defense to their violation in the case of *United States v. Grimaud*.[23] The acts provided that the Secretary of Agriculture should make and promulgate rules and regulations concerning the management of the forest reservations, and made the violation of such rules a criminal offense. The Court held that the acts were not an unconstitutional delegation of legislative power, since the making of rules was an administrative detail which in the nature of things it was impracticable for Congress to provide. Thus the Secretary of Agriculture could make any rules which would insure the object of the reservation.

There has been a continual dispute concerning the constitutionality of Congressional Acts delegating power to various boards and commissions and especially the delegation of discretionary powers to the Interstate Commerce Commission. In the case of *Interstate Commerce Commission v. Goodrich Transit Company*[24] the court said, "Congress may not delegate its purely legislative power to a commission, but having laid down the general rules of action under which the commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by Congress."

A more recent decision in point was handed down by the Supreme Court of the United States in upholding the validity of the flexible tariff

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[19]St. Louis, I. M. & SR. Co. v. Taulor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061 (1907).

[20]192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904).

[21]*Supra* footnote 14.

[22]30 STAT. 35 (1897), Chap. 2 U. S. Comp. Stat, 1539 (1901), for transfer of power under this act from Secretary of Interior to Secretary of Agriculture, see 33 STAT. 628 (1905) Chap. 288 U. S. Comp. Stat. Supp. 576 (1909).

[23]220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1910).

[24]224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 759 (1911), see also: United States v. Atchison, T. & S. F. R. Co., 234 U. S. 76, 34 Sup. Ct. 986, 58 L. ed. 1409 (1913) holding that legislative power was not unlawfully delegated to the Interstate Commerce Commission by vesting it with a sound legal discretion in the fixing of rates with regard to a long and short haul.

Avent v. United States, 266 U. S. 127, 45 Sup Ct. 34, 69 L. ed. 202 (1924), holding that Congress may delegate to the Interstate Commerce Commission power to determine the order of purposes for which coal may be shipped in interstate commerce in case of emergency.

Red "C" Oil Manufacturing Company v. Board of Agriculture, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240 (1911), holding that legislative powers were not unconstitutionally delegated to the Board of Agriculture by provisions of a North Carolina act which required that illuminating oils sold or offered for sale in the state be safe, pure, and afford a satisfactory light, leaving it to the board to determine what oils will measure up to these standards.

clause in *Hampton & Company v. United States.*[25] In the course of his opinion in that case Mr. Chief Justice Taft said: "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations . . . (a number of the cases already discussed in this article were here cited as the basis for the above statement) . . . Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent upon future conditions, and it may leave the determination of such time to the decision of an executive, . . . If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

It will be noticed from a review of the cases thus far that the Supreme Court has constantly in the interpretation of acts of Congress allowed that body an ever increasing latitude in the delegation of its power. Such a course was again followed in the case of *New York Central Securities Corporation v. United States.*[26] The provisions of the Interstate Commerce Act empowering the Interstate Commerce Commission to authorize the acquisition of control of one carrier by another if of the opinion that such acquisition of control will be "in the public interest," were attacked as an unconstitutional delegation of legislative power because no definite criterion was stated. The Court held that "the public interest" was the stated criterion and that such criterion was sufficient since it referred not to general welfare but had a direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities.

This brief summary of the leading cases reveals that the Supreme Court has constantly maintained that legislative power cannot be delegated, and yet, with the exception of the act involved in the instant case, no law has ever been declared unconstitutional on that ground. In other words in every case where the point has been raised the Court has assumed an ever broadening view as to what would be necessary to make the delegation of power unconstitutional. The decisions have not drawn any clear

[25]276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1927); see also: United States v. Chemical Foundation, 272 U. S. 1, 47 Sup. Ct. 1, 71 L. ed. 131 (1926) holding that there was not an unconstitutional delegation of legislative power in the provisions of the Trading with the Enemy Act authorizing the Alien Property Custodian to sell property under his control in accordance with the determination of the President. Wisconsin v. Illinois, 278 U. S. 367, 49 Sup. Ct. 163, 73 L. ed. 426 (1928), holding that permitting the Secretary of War to determine amount of water that can safely be taken from Great Lakes, under authority of act of Congress, is not unlawful delegation of legislative power.

[26]287 U. S. 12, 53 Sup. Ct. 45, 77 L. ed. 138 (1932); see also: United States v. Shreveport Grain & Elevator Company, 287 U. S. 77, 53 Sup. Ct. 42, 77 L. ed. 175 (1932) holding that while the legislative power of Congress cannot be delegated, Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the power to fill up the details by prescribing administrative rules and regulations.

or definite line between that power which is exclusively legislative and that which is administrative and may be delegated, but each case has been decided on its own set of facts and the construction of the statute therein involved.

However, certain general principles have been established, namely: (1) Congress cannot delegate its exclusive legislative power, but it may enact laws and delegate the making of administrative rules and regulations to the executive; (2) In so doing Congress may leave acts to the discretion of the executive provided a fixed standard or criterion is established by the act itself which will guide the executive in the making and enforcing of such rules.

In the light of these principles and with this review of precedent as a background, let us consider the instant case. The facts are briefly these: Pursuant to the authority granted in section nine (c) of the National Industrial Recovery Act (quoted in full *supra*), the President on July 11, 1933, prohibited the transportation of "hot oil"[27] in interstate and foreign commerce in excess of the amount permitted to be produced or withdrawn by state laws.[28] Authority to enforce such regulations was duly vested by executive order in the Secretary of the Interior on July 14, 1933. The Panama Refining Company and the Amazon Petroleum Company both brought actions to enjoin the enforcement by government officials of the restrictions on the production of oil.[29]

Mr. Chief Justice Hughes delivered the opinion of the Court from which Mr. Justice Cardozo dissented. The gist of the decisions, according to the majority opinion, is that the failure of Congress to declare the circumstances or conditions under which the transportation of petroleum was to be prohibited rendered the Act subject to the construction that it gave the President unlimited authority, and it was therefore, an unconstitutional delegation of legislative power.[30] This result was reached when the court could, from an examination of the statute, find no policy which Congress had declared in respect to such excess oil, no standard which Congress had set up for the President's action, and no necessity for the finding of any fact by the President in the exercise of the authority to enact the prohibition. Still another and secondary reason given for the holding is that the executive order imposing the restriction contained no finding of facts as a basis for the order.

The primary question being the constitutionality of the section, the sufficiency of the form of the executive order will not be considered.

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[27]Oil exceeding that allowed by state law to be sold or transported.

[28]The full text of the Executive Order of July 11, 1933, is as follows: "Prohibition of Transportation in Interstate and Foreign Commerce of Petroleum and the Products thereof Unlawfully Produced or withdrawn from Storage.

"By virtue of the authority vested in me by the Act of Congress entitled An act to encourage National Industrial Recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes,' approved June 16, 1933, the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation, or order prescribed thereunder, by any board, commission, officer or other duly authorized agency of a State, is hereby prohibited."

[29]Panama Refining Co. v. Ryan and Amazon Petroleum Corp. v. Ryan, ... U. S. ....., 55 Sup. Ct. 241 (adv. Sheet), 79 L. ed. 223 (adv. sheet) (1935).

[30]Case and Comment vol. 40 No. 4.

With the two general principles gathered from a study of precedent as a basis let us turn to an analysis of the decision. It appears that the Court made no effort to draw any distinction between power which may be delegated and that which is exclusively legislative. There is no indication that the power to prohibit the interstate transportation of "hot oil" could not be delegated to the President. Instead the holding of the court is based almost entirely on the failure of the Act itself to fulfill the requirement of the second general principle. The majority opinion considers section nine (c) entirely alone and holds only that section to be unconstitutional. The remainder of the National Industrial Recovery Act is not directly affected by the decision.

Examining section nine (c) it is evident that no policy or standard is there laid down. The section is a mere grant of power to the President to prohibit certain acts. No reason is given for the grant; no facts must exist before it can be exercised; no rule or criterion is stated to guide the President in ascertaining when the enforcement of the prohibition would be advisable. In other words, when considered alone, the section seems to be a grant to the President of an arbitrary power to be exercised entirely according to his own will, and with nothing whatsoever to direct or limit such exercise. It is not the making of regulatory and administrative rules for putting a law into effect, but is the making of a law itself, and as such is undoubtedly an unconstitutional delegation of legislative power.

The purpose of the statute might easily have been accomplished if the section had merely contained a statement as to what facts should exist before the power granted should be exercised. Thereby a policy would have been stated and a sufficient limitation placed on the action of the President to make his actions administrative rather than legislative.

Mr. Justice Cardozo in the dissenting opinion looked to the whole National Industrial Recovery Act, and asserted that a reasonably clear standard was established. By using a great latitude in the construction of the Act it is possible to find a comparatively sound basis for such a holding.

It is well established that the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.[31] The policy of the entire National Industrial Recovery Act is stated in section one of the act,[32] and it is contended that

[31]Red Bird v. United States, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. ed. 96, (1906); McKee v. United States, 164 U. S. 287, 17 Sup. Ct. 92, 41 L. ed. 437 (1896); Talbott v. Board of Commissioners of Silver Bow County, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. ed. 210 (1890).

[32]"Section 1 . . . It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources. The act as a whole is entitled "To encourage national industrial recovery, to foster fair competition, and to provide for construction of certain useful public works, and for other purposes."

such policy is imported by implication into section nine (c), and that the President is guided and bound by such policy in the exercise of the power granted by the section. Nevertheless, the terms of the policy or standard so stated are very broad and indefinite and seem in reality to be, as was maintained by the court in the majority decision, a mere introduction to the act itself and not the expression of a legislative policy to the administered through the making of rules by the executive or those appointed by him.

The court in the cases discussed in the first pages of this article leaned constantly toward the fact that the policy or standard should be definite and should be something more than mere general welfare,[33] and this view seems to dispel all doubt as to the correctness of the majority holding; for the policy of the entire act is little more than "general welfare." It is interesting to notice that the question is entirely one of construction and that the majority and dissenting opinions both cite substantially the same cases as substantiating the position taken.

The decision is of historic importance because it is the first act of Congress which has been held unconstitutional as being a delegation of legislative power to the executive branch of the government, and also because it is one of the first decisions under the National Industrial Recovery Act. However, it throws very little light on such legislation generally as the Court was very careful to confine its discussion to the specific provisions of the section of the act involved.[34]

GUY MITCHELL, JR.

THE CONSTITUTIONAL VALIDITY OF THE "GOLD CLAUSE" CASES

"Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold of a particular kind of coin, or currency, or in any amount in money of the United States, measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained there or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency, which at the time of payment is legal tender for public and private debts."[1]

Thus read in part a resolution passed by Congress in July, 1933, as one of the measures in the reconstruction of the monetary system of the United States by the President, which has resulted in one of the most drastic upheavals in the legal status of gold ever recorded in history.[2]

Gold has always played an important part in shaping the history of nations with the Italian city of Florence having the honor of being the

[33] *Supra* footnote 26.

[34] The constitutional faults set out by the court in its decision have been sought to be remedied by the Connally Bill passed recently by Congress. Pub. No. 14, 74th Cong., 1st Sess. (1934).

[1] U. S. C. A. July 1933. Special Pamphlet p. 75. 48 STAT. 112 (1933).

[2] Herbert Barry, *Gold* (1933), 20 VA. LAW REV. 263.

scene of the first gold coinage in 1252. England was, however, the first nation to take definite legal steps concerning gold, when the Act of 1816 made it the legally adopted monetary standard of that country.

The history of gold in the United States began in 1792, but it was not until 1873 that America definitely went on the gold standard. At this time the gold content of the dollar had been fixed by statute[3] at 25.8 grains of gold .9 fine, and was circulating freely through the country. The "silverites," however, fought the "gold men" bitterly, with the defeat of the "silverites" champion, William Jennings Bryan, for the presidency in 1896, sounding the death knell of the move.

Standing at the very threshold of the judicial interpretations of monetary questions stands the case of *Bronson v. Rhodes,*[4] in which case the court was called upon to decide whether payment of a mortgage note calling for "payment in gold and silver coin, lawful money of the United States" in notes was a valid satisfaction of the recognized obligation. In this first decision, the nation's judiciary held that "such a contract cannot be satisfied by a tender of United States notes, and payment must be made according to the terms of the contract." The judicial rule as to this question became more or less fixed during the latter part of the nineteenth century by ten decisions upholding the view expressed in the land-mark case of *Bronson v. Rhodes*: *Trebilcock v. Wilson,*[5] *Butler v. Horwitcz,*[6] *Deering v. Sears,*[7] *Vaughn v. Telegraph,*[8] *The Emily Sounder,*[9] *Thompson v. Butler,*[10] *Gregory v. Morris,*[11] *Thompson v. Riggs,*[12] *Maryland v. Ry. Co.,*[13] and *Woodruff v. State of Mississippi.*[14]

The inevitable passage of time, however, brought about a more closely unified world, at least from an economical and financial aspect, and gold has become a matter, not of local or national importance, but a matter of the gravest international concern. The period of worldwide depression suffered by the nations of the world has caused, since the beginning of the twentieth century, quite a number of these world powers to refuse to uphold the so-called gold clause contracts. Since any action enforcing specifically these stipulations would result in nothing less than nationwide bankruptcy, sixteen nations have permitted the abrogation of gold clauses by statutory enactments.[15] The most recent nation to adopt this view was England, when the court held in the celebrated case of *Feist v. Societe Intercollmunale Belge d'Electricite*[16] that the gold payment clause was inoperative and the debt dischargeable in legally adopted banknotes.

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[3]17 STAT. 426 (1873).
[4]Bronson v. Rhodes, 7 Wall. 229 (1866).
[5]Trebilcock v. Wilson, 12 Wall. 687, 20 L. Ed. 460 (1872).
[6]Butler v. Horwitz, 7 Wall. 258, 19 L. Ed. 149 (1869).
[7]Deering v. Sears, 11 Wall 379 (1870).
[8]Vaughn v. Telegraph, 14 Wall. 258 (1871).
[9]The Emily Sounder, 17 Wall. 666 (1873).
[10]Thompson v. Butler, 95 U. S. 694 (1877).
[11]Gregory v. Morris, 96 U. S. 619 (1877).
[12]Thompson v. Riggs, 5 Wall. 663 (1866).
[13]Maryland v. Ry. Co., 22 Wall. 105 (1874).
[14]Woodruff v. State of Mississippi, 162 U. S. 291 (1896).
[15]Egypt, Belgium, Italy, Roumania, Greece, Jugoslavia, Bulgaria, Mexico, Costa Rico, Sweden, Esthonia, Austria, Columbia, Guatemala, and Cuba.
[16]Feist v. Societe Intercollmunale Belge d'Electricite (1933), 49 T. L. R. 344.

On March 24, 1933, when President Franklin D. Roosevelt took the oath of office, the Swiss franc, the Dutch guilder, and the United States dollar were the only coins that had not been devalued or depreciated. Country after country was going off the gold standard, and thirty foreign countries, had passed drastic legislation with regard to finance, foreign commerce, and the regulation of money. Embargoes, trade restrictions, and quotas were characteristic of the day and time. The situation in the United States at this time was grave and no one dared to deny that a national emergency existed.

Striking quickly after taking the oath of office, President Roosevelt declared on March 6, a national three day bank holiday, with Congress confirming the act of the President three days later and giving him still additional powers. On April 5 the hoarding of gold was prohibited, and on June 5, Congress passed Joint Resolution 10,[17] which proved to be the basis for the now-famous "Gold clause" cases.

On January 30, 1934, the Gold Reserve Act was passed by Congress transferring and vesting in the United States, all right, title, and interest of the Federal Reserve Board, of every Federal Reserve Bank, and every Federal Reserve agent in and to all gold coin and gold bullion in their possession, and paid or exchanged gold certificates therefor. On January 31, 1934, a proclamation was issued by the president citing the findings of the Congress, and making elaborate findings of their own to the effect

[17] "To Assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affects the public interest and are therefore subject to proper regulations and restrictions; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee the right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts.

RESOLVED by the Senate and the House of Representatives of the United States of America in Congress assembled, that (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or money, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, hereafter or heretofore incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment dollar for dollar, in any coin or currency which at the time of payment is legal tender of public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of such provision shall not invalidate any other provision or authority contained in such law.

(b) as used in this resolution, the term 'obligation' means an obligation (including obligation of and to the United States excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations.

All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.

that the foreign commerce of the United States, to use the exact language —"is adversely affected and that an economic emergency requires an expansion of credit" and finding further "that in order to stabilize domestic prices and to protect the foreign commerce . . . it is necessary to reduce the weight of the gold dollar," and, therefore, the same was fixed at its present weight and fineness of 15 and 5-21 grains of gold .9 fine.

The apparent continuity and consistent purpose of these acts formed one of the most forceful arguments for the governmental counsel when the question of the constitutional validity of the Joint Resolution came before the nation's highest judiciary for decision on January 9, 1935. The very evident harmony between the legislative and judicial branches of the national government in the approval each division quickly gives to the emergency measures of the other were presented before the justices of the Supreme Court; and the fact that a decision on the part of that body that any one of these measures was unconstitutional would completely undermine the entire structure and plunge the nation into economic chaos, formed another convincing feature of the arguments of the government's legal corps.

The constitutional validity of the Joint Resolution impairing the validity of these "gold clause" contracts was brought before the United States Supreme Court in all its aspects in four of the most widely publicized cases of the twentieth century, styled *Norman v. Baltimore & Ohio Ry. Co.*,[18] *United States et al v. Banker's Trust Co.*,[19] *Perry v. United States*,[20] and *Nortz v. United States*.[21] In rendering decisions on these cases, the Supreme Court combined the first two mentioned, and handed down three separate opinions, with one being devoted to the abrogation as related to private contracts, one to government certificates, and one to Liberty Loan bonds.

In the case of *Nortz v. United States*, the plaintiff brought suit as owner of gold certificates of the Treasury of the United States of the nominal amount of $103,300. He alleged that these certificates called for payment of a dollar in gold deposited in the Treasury of the United States, and that at the time of the issuance of these certificates that a gold dollar contained 25.8 grains of gold, nine tenths fine, but that at the time he was forced to turn these certificates in by action of Congress that a gold dollar contained only 15 and 5-21 grains of gold .9 fine, and that according to this ratio he was entitled to receive $170,634.07 in legal tender according to the present monetary standard. Plaintiff further claimed that by his forced delivery of the gold certificates to the Treasury in exchange for currency not redeemable in gold, he was deprived of his property without due process of law.

In passing upon the case, the court certified three questions involved in the litigation:

> "1. Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or hold gold coins or gold certificates, who, on Jan. 17, 1934, had sur-

[18]Norman v. Baltimore & Ohio Ry. Co., 55 S. Ct. 407 (1935).
[19]United States et al v. Banker's Trust Co., *Ibid.*
[20]Perry v. United States, 55 S. Ct. 432 (1935).
[21]Nortz v. United States, 55 S. Ct. 428 (1935).

rendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, .9 fine, and the market price thereof on January 17, 1934, was in excess of the currency so received?

2. Is a gold certificate, Series of 1928, under the facts stated in question one an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

3. Do the provisions of the Emergency Banking Act of March 9, 1933, and the Order of the Secretary of the Treasury dated Dec. 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question one to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment of the Constitution of the United States?"

The defendant demurred to the petition upon the ground that it did not state a cause of action against the United States, and the Supreme Court held in regards to this demurrer, that though the demurrer admitted the facts well pleaded, that it did not admit allegations which amounted to conclusions of law in relation to the nature of the gold certificates or the legal effect of the legislation under which they had been issued, held or to be redeemed—citing in support of the holding of four prior rulings of the same court.[22]

In the course of the decision on this case, the court pointed out that the issuance of such certificates as held by the plaintiff in this case was based on the Act of March 3, 1863, which provided that the Secretary of the Treasury might receive "deposits of gold coin and bullion" and issue certificates therefor "in denominations of not less than twenty dollars each, corresponding with the denominations of the United States." Further on in the discussion of this point, the court quotes the Act of March 14, 1900, which, besides fixing the gold content of the dollar at 25.8 grains of gold .9 fine, specifically stated that coin was to be deposited and gold certificates issued therefor, and that this gold deposited was "to be held by the Treasury for the payment of such certificates on demand, *and should be used for no other purpose.* On this stipulation the plaintiff argues that these certificates constitute the equivalent for "warehouse receipts," and that he had a right to demand this specific gold on proper presentation of the certificates. However, the court, held that these gold certificates were currency, and that being currency and constituting legal tender, it is entirely inadmissible to regard the gold certificates as warehouse receipts. "They were not contracts for a certain quantity of gold as a commodity. They called for dollars, not for bullion."

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[22]Dillion v. Barnard, 21 Wall. 430, 22 L. Ed. 673; U. S. v. Ames, 99 U. S. 35, 25 L. Ed. 295; Inter-state Land Co. v. Maxwell Land Grant Co., 139 U. S. 569; Equitable Life Assurance Soc. v. Brown, 213 U. S. 25, 29 S. Ct. 404.

After definitely holding, on the basis of a number of landmark cases in regard to jurisdiction of the Court of Claims in questions of damages[23] that the Court of Claims was not instituted to try a case for nominal damages, the court held that plaintiff here would have to prove actual damages in order to be heard in the Court of Claims.

In specific application of this ruling, the court here points out that at the time the plaintiff was forced to surrender the gold certificates in exchange for legal tender other than gold coins, that the gold content of the United States dollar had not been deflated, and that the Act of March 14, 1900, fixing the standard unit of the gold dollar at 25.8 grains, .9 fine, "with which all forms of money issued or coined by the United States" were to be maintained at a parity, was "still in effect." Thus because of the fact that the currency paid to the plaintiff for his gold certificates was then on a parity with that standard of value, the court held that in receiving the currency on that basis, that he did not sustain any actual loss.

Continuing more in the nature of dicta, the court brought out a rather novel and interesting loop-hole available to the government in cases of this kind, where the surrender of the certificates had not been made prior to the devaluation of the gold dollar. As pointed out by the court, he cannot claim any better position here than that in which he would have placed had the gold coin then been paid to him. But, if that had been the case, the plaintiff presents no authority to hold or to deal in gold coin, and the first question cited by the Court of Appeals negatives the assumption of such a license. Therefore he would have been required, under the existing laws[24] to have handed over this gold coin to the government and received payment on the basis of one dollar in currency for every dollar of the content of 25.8 grains, .9 fine.

On the above assumption, the court answers the questions presented above in the following manner: No. 1—No; No. 2—"Unnecessary to answer"; No. 3—"Academic and also need not be answered."

In the case of *Perry v. The United States*[25] the plaintiff brought action as the owner of one of the Fourth Liberty Loan Bonds issued in 1918. The bond provided "The principal and interest hereof are payable in United States gold coin of the present standard of value," and on the basis of this provision plaintiff demanded either 10,000 (the face amount of the bond) gold dollars consisting of 25.8 grains of gold .9 fine, or else 258,000 grains of gold, of the same degree of fineness. On refusal of the government to meet this demand, plaintiff brings this action for 10,000 gold dollars each containing 25.8 grains of gold .9 fine or $16,931.25 in legal currency.

On the appeal to the United States Supreme Court, the Court of Appeals certified the following two questions:

> "1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the

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[23]Grant v. United States, 7 Wall. 331, 19 L. Ed. 194 (1868); Marion & Rye V. Ry. Co. v. United States, 270 U. S. 280 (1925).

[24]Act of Dec. 28, 1933.

[25]Perry v. United States, 55 S. Ct. 432 (1935).

principal amount of $10,000 issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress abrogating the gold clause in all obligations?"

Basing practically the entire opinion around the construction given the fourth section of the Fourteenth Amendment, which declares: "The validity of the public debt of the United States authorized by law . . . shall not be questioned," the court construed the expression "the validity of the public debt" as embracing whatever concerns the integrity of the public obligation, and emphatically declared that the United States is as much bound by its obligations as are individuals.

The contention of the government attorneys that "earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce," brought forth bitter denunciation of the minority opinion. The court, speaking through Chief Justice Hughes, emphatically stated that "the contention of the government necessarily imports that the Congress can disregard the obligations of the government at its discretion, and that, when the government borrows money, the credit of the United States is an illusory pledge."

An interesting feature distinguishing this case (*Perry v. United States*) from the other so-called "Gold Clause Cases," is the fact that in this instance, the United States plays the dual role of debtor and regulator of the monetary system of the nation under the specific provision of the Constitution. The consideration necessarily given this status of the government harkened back to the famous *Sinking Fund Cases*[26] when the first promulgation of the attitude of the court on this dual status of the government was given in the following words: "when a government enters into a contract with an individual, it disposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of moral agent, with the same rights and obligations as an individual." Regardless of the specific power to regulate the value of all monies, given in the constitution, the government, then it would seem, is as much bound by its contracts as are individuals. "If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that the term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

The only distinction between the status of the government and an individual under contractual stipulations, the Supreme Court held accord-

[26]Can. Pac. Ry. Co.; Leland Stanford v. Gallatin, 99 U. S. 731, 25 L. Ed. 504 (1878).

ing to a prior decision,[27] is that the United States cannot be sued without its consent, and therefore on the assumed inability of a contracting party to legislate away its own legal liability, the nation's judiciary unequivocally held that the "Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond Congressional power."

However, regardless of the invalidity of the resolution, the plaintiff must show actual damages before he can recover in the Court of Claims—as that court has no authority to entertain an action for nominal damages.[28]

As to the actual damages suffered by the plaintiff due to the refusal of the government to pay the face value of the liberty bonds in gold dollars of the 1918 content, the burden of proving these damages is placed on the plaintiff, and because of his failure to here meet this burden, the court reasons that he has suffered none.

By way of dicta concerning future "would be litigants," on these gold clause bonds, the litigant is restricted in his evidence as to damages to his home buying power, because of the clause in the resolution forbidding importation or exportation of gold coin subsequent to the date of the issuance of the joint resolution. This restriction on the part of the government is based on the broad grounds of *Ling Su Fan v. United States*[29] in which the specific statement is made: "however unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin."

An apparent inconsistency between the instant case and the famed Legal Tender Cases[30] is easily cleared, when attention is called to the fact that during the period of the Legal Tender Acts[31] gold coin was in circulation, while in the instant case all gold coin or bullion had been recalled by action of the government prior to the refusal of the government in this case to pay the plaintiff the face amount of his liberty bond in gold coin of the content of 25.8 grains of gold .9 fine.[32]

Next we come to the most outstanding decision of the Gold Clause Series in the verdict handed down in the combined cases of *Norman v. Baltimore and Ohio Ry. Co.,* and *United States et al v. Banker's Trust Co. et al,* in which cases, the court was called upon to decide as to the validity of the Joint Resolution with respect to "gold clauses" of private contracts for the payment of money.

In the first of these cases plaintiff held a bond coupon under issuance date of February 1, 1930. The bond provided that the payment of principal and interest "will be made . . . in gold coin of the United States of America or of equal to the standard weight and fineness existing on February 1, 1930." On presentation of this coupon in 1934, payment in gold dollars of the 25.8 grain content and even in legal tender equiva-

[27]United States v. Bank of Metropolis, 15 Pet. 377, 10 L. Ed. 774 (1841).
[28]*Supra,* Note 23.
[29]Ling Su Fan v. United States, 218 U. S. 302, 54 L. Ed. 1049 (1910).
[30]Knox v. Davis, 12 Wall. 457, 20 L. Ed. 287 (1870).
[31]Act of February 25, 1862.
[32]1862-1863.

lent to that amount was refused. Plaintiff sues to collect the difference between the 25.8 grain content of the dollar in 1930 and the 15 5-21 grain content of the current dollar.

The second of these cases presented a much more involved statement of facts due to the interference of the government trustees under a mortgage. The question here arose with respect to an issue of 1903 bonds by the St. Louis, Iron Mountain and Southern Ry. Co. which provided for the payment of "one thousand dollars gold coin of the United States of the present standard of weight and fineness." In 1907, the Missouri Pacific Ry. Co. acquired the property of the obligor subject to the mortgage securing the bonds. In 1933, the United States District Court approved a petition in bankruptcy filed by the latter company. During the following December, the trustees under the mortgage asked leave to intervene, seeking to have the income of the property applied against the mortgage debt, and alleging that the debt was payable "in gold coin of the United States of the standard of weight and fineness prevailing on May 1, 1903." Later, the Reconstruction Finance Corporation, and the United States, as creditors of the debtor, filed a joint petition for leave to intervene, in which they denied the validity of the gold clause contained in the mortgage and bonds. Leave to intervene specially was granted, and the District Court decided on the hearing that the Joint Resolution of June 5, 1933, was constitutional, and that the trustees were entitled, in payment of the principal of each bond, to $1000 in money constituting legal tender. An appeal brought this decision before the Supreme Court for final adjudication.

In the initial part of the decision, Chief Justice Hughes disposes of the previous decisions by this tribunal on monetary questions[33] by the specific statement that "discussions of this court relating to clauses for payment in gold did not deal with situations corresponding to those now presented." However, the prior adopted rule of this court as promulgated in the case of *Bronson v. Rhodes*[34] was admittedly given over to the policy that a gold clause stipulation in a contract meant "a contract to deliver an equal weight of bullion of equal fineness." Continuing, however, the court here contends that such a decision was based upon an "assumption" which must not necessarily longer be followed by the court.

Taking a step further, the definite decision of this court is admittedly changed to the view that gold clause stipulations are to be considered not as contracts for the payment in gold coin as a commodity, or in bullion, but as contracts for the payment of money. In order, however, for the tribunal to take such a step, a sound basis must be laid for such action on proper findings in three considerations: (1) the power of the Congress to establish a monetary system and the necessary implications of that power; (2) the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority; and (3) whether the clauses in question do constitute an interference as to bring them within the range of that power.

[33]Trebilock v. Wilson, 12 Wall. 687, 20 L. Ed. 460 (1872); Butler v. Horwitz, 7 Wall. 258, 19 L. Ed. 149 (1869); Deering v. Sears, 11 Wall. 739 (1870); Vaughn v. Telegraph, 14 Wall. 258 (1871); The Emily Sounder, 17 Wall. 666 (1873); Thompson v. Butler, 95 U. S. 694 (1877).

[34]Bronson v. Rhodes, 34 N. Y. 649, 7 Wall. 229 (1866).

Article I, Section 8 of the Constitution[35] forms the basis for the determination of the first of these considerations, with the Legal Tender case of *Knox v. Davis*[36] admittedly giving such power in its grant to Congress of the right to make Treasury notes legal tender in payment of debts previously contracted, as well as those subsequently contracted, whether that authority be exercised in time of war or time of peace. This complete vesting of all power over currency to Congress, combined with the power to coin, forbid mutilation, melting, exportation or importation, granted in *Ling Su Fan v. United States*[37] satisfied the court as to this point, and it is definitely determined that Congress has such power as here desired together with the necessary implications.

In answer to the second of the self-imposed obstacles before admitting the validity of the New Deal's contentions in regard to the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority, the court resorted to one of the most rational bits of argument and reasoning contained in the entire majority opinion.

To the contention of the plaintiffs in the instant cases, that Congress is seeking not to regulate the currency, but to regulate contracts and is therefore stepping beyond the power conferred, the judiciary gave a concise and complete answer in the following words: "contracts, however express, cannot fetter the constitutional authority of the Congress." Continuing, the court reasoned that contracts may create rights in property, but, when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. "Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them."[38]

The admitted right of Congress to interfere in cases involving commerce shipping contracts between municipalities and carriers, and even when made under a charter granted by a state[39] formed the basis for the very rational reasoning on the part of the court that if this power was recognized then why should not a contract between individuals under similar circumstances be subject to the same regulation by Congress?

Three previously decided cases, emphatically holding that Congress recognized no such limitation as the right of private individuals to subordinate the exercise of the federal authority to the continuing operation of previous contracts[40] were interpreted by the majority opinion here to support the reasoning that in the exercise by Congress of the constitutional right to regulate the currency and to establish the monetary system of the country, that if the gold clauses now before the court interfered with the policy of the Congress in the exercise of that authority, they cannot stand.

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[35]"To Coin Money, Regulate the Value Thereof, and of Foreign Coin."
[36]12 Wall. 457, 20 L. Ed. 287 (1870).
[37]218 U. S. 302, 54 L. Ed. 1049 (1910).
[38]Hudson St. Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828 (1907).
[39]New York v. United States, 257 U. S. 591, 66 L. Ed. 385 (1921); Armour Packing Co. v. United States, 209 U. S. 56 (1908).
[40]Pac. & Wash. Ry. Co. v. Schubert, 224 U. S. 613; Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581 (1931); Fed. Radio Co. v. Nelson Bond & Mort. Co., 289 U. S. 266 (1932).

Passing on next and lastly, to the question whether the "gold clauses" here involved do constitute such an interference as to bring them within the range of that power, the court harkened back to the *McCullock v. Maryland*[41] landmark case as a basis for the statement: "if it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means is final." The real question involved, whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy, is said to be entirely a question of fact and in respect to these conditions and determinations the Congress is entitled to its own judgment.

The tendency to hoard gold on the part of the public, and the continued exportation of gold to foreign lands, over which complete control is given to Congress by *Ling Su Fan v. United States*[42] were together sufficient detriment to the welfare of the nation, to warrant the decision on the part of the court that the enforcement of the gold clause cases were incompatible with the public interest. "Even," stated Chief Justice Hughes, "if the clauses are treated as 'gold value' clauses, that, is, as intended to set up a measure of value if gold coin is not available, we think they are still hostile to the policy of Congress, and hence subject to prohibition."

The utter impossibility of public utilities, corporations, municipalities, etc., to meet their bonds under the present income based on the inflated currency, if these bonds were required to be paid according to the gold value prior to the issuance of the "devaluation" order of the president, makes the decision upholding the validity of the "gold clause" abrogation act of Congress a reasonable exercise of constitutional power. "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of Congress over the monetary system of the country and its attempted frustration," stated the court in the closing paragraph of the majority opinion.

Continuing, the chief justice states: "The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and states and municipalities, may make and enforce contracts which may limit their authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress, and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed."

In a very bitter dissenting opinion by Justice McReynolds, with Justice Sutherland, Justice Van Devanter, and Justice Butler, concurring, the "real" question involved in the Gold Clause cases was stated to be:

"Whether recent statutes passed by Congress in respect of money and credits were designed to attain a legitimate end; or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated

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[41]McCulloch v. Maryland, 4 Wheat. 421, 4 L. Ed. 579 (1819).
[42]218 U. S. 302, 54 L. Ed. 1049 (1910).

a plan primarily designed to destroy private obligations, repudiate national debts, and drive into the Treasury all gold within the country in exchange for inconvertible promises to pay, of much less value."

Basing almost the entire argument presented in the dissenting opinion on the Legal Tender Cases,[43] Justice McReynolds attempts to distinguish these famous decisions from the Gold Clause Cases primarily on the grounds that the paper money issued in 1862 by the government and later declared valid legal tender in spite of the fact that there was no gold reserve to back up the issue, was "for the purpose of meeting honorable obligations—not to repudiate them."

Taking issue with the majority opinion in the interpretation of the oft-repeated excerpt from the familiar case of *McCulloch v. Maryland*[44] that "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional" the minority opinion not only stated that the "end or objective of the Joint Resolution was not 'legitimate'," but that "the real purpose was not to assure uniform value to the coins and currencies of the United States, but to destroy certain valuable contract rights."

Further declaring on the basis of *Reagan v. Farmer's Loan & Trust Co.*[45] that "the power to regulate is not a power to destroy," the dissentors stated that the declaration in the majority opinion that no damage resulted to the holder now before the court because of the fact that payment in gold coin of the kind designated or its equivalent was refused amounted to a declaration that the government may give with one hand and take away with the other. Default is thus made both easy and safe."

Finally closing with the now-famous statements: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling," the four dissentors had recorded a dissenting opinion varying sharply and in unequivocal terms with that held by the majority of the court.

To consider these cases from both the standpoints of the majority and the minority opinions without realizing a sincerity and confidence in the particular opinion expressed on the part of the justices on both sides of the controversy, is impossible. However, the weight of reason and right seems to lie on the side of the majority opinion, especially when a liberal construction is placed on the constitutional interpretation under the light of the exigencies of modern time.

One of the most striking features of the argument presented by the majority opinion is the contention that there is a force higher even than the right of private individuals to make contracts. The good of the whole is a higher right to be considered than the good of a few, and in a government based on democratic principles of a rule "of the people, by the

[43]Knox v. Davis, 12 Wall. 457, 20 L. Ed. 287 (1870).
[44]*Supra,* Note 41.
[45]Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893).

people and for the people," the declaration of this higher right by judicial interpretation, if not by specific constitutional enactment, is in keeping with the higher rules of propriety and right.

Any inflation or deflation of the currency of the nation by act of Congress is necessarily effective on every part of the nation and on every contracting party therein. For this reason, regardless of whether or not a contract contains "the gold clauses," the plane of the money in which the obligor pays the debt will be the same as the plane of the purchasing power of the obligee. Any enforced payment of debts after inflation of the currency according to deflation terms would have nothing less than catastrophic effects on the economic status of the nation at any time—particularly during a period of economic instability such as was being experienced when the "gold clause" impairment resolution passed Congress in 1933.

The admitted power of Congress to impair the validity of any contract made between a state or municipality and an individual on the broad grounds of public policy, naturally leads to the inevitable conclusion that but a bit further extension of this reasoning will justify the application of this same power to contracts between private individuals.

The right of a contracting party, against whom the power of Congress to impair the validity of a private contract has been exercised, to sue in the Court of Claims for any actual damage experienced by such action of Congress, is a right which should be carefully guarded in the future. Formed for the purpose of hearing suits against the government based on contract rights, the Court of Claims is the proper judiciary to hear such claims, with the final appeal to the Supreme Court affording a complete adjudication of any grievances as could be reasonably desired by any citizen. Also a check on Congress to the extent where no action can be taken actually damaging the economic and contractual rights of a party without involving the government by such action is afforded by this recourse given the nation's citizenry.

Masterful presentations of the conflicting views on control of Congress over monetary matters are made by Chief Justice Hughes and Justice McReynolds, with the weight of reason at the present time apparently lying on the side of the "liberals" as voiced by Chief Justice Hughes. However, time and time alone will prove on which side the sanest thinking and judgment lies.

FRED M. GLASS

RECENT IMPORTANT DECISIONS

CRIMINAL LAW— ADMISSIBILITY OF EVIDENCE OF COMMISSION OF ONE CRIME TO PROVE IDENTITY OF PERSON COMMITTING ANOTHER CRIME

Defendant was convicted of robbery with a deadly weapon and the jury fixed the penalty at death, as provided by state law. The person robbed could not positively identify the defendant because the robber was masked, but the court admitted evidence that only a few minutes after the robbery, a witness, Gaines, saw defendant in the immediate vicinity of the crime, and tried to arrest him, whereupon defendant shot him. Defendant assigns error on the grounds that testimony tending to prove defendant guilty of another crime cannot be introduced on trial for a separate crime, and also on the grounds that evidence of flight involving proof of the subsequent crime should not have been admitted. HELD: Affirmed. Evidence of another crime is admissible for the purpose of identifying the defendant as the person committing the crime for which he is on trial. Evidence of flight from the scene of crime is admissible, even though the proof of it involves proof of the second crime. *Brown v. State,* ..... Miss. ....., 157 So. 363 (1934).

It is a general rule of criminal law that when a defendant is on trial for a particular crime, evidence of the commission of another crime, even though one of the same sort, cannot be used against him. However, there are several recognized exceptions to this rule,[1] one of which is that of evidence tending to prove the identity of the accused.[2] This case seems to come clearly within the exception named.

The Court cites only one case in its opinion, *Rosetto v. City of Bay St. Louis.*[3] In that case, the court held that evidence tending to prove that when the house of defendant was raided and he was arrested for conducting a gambling house in violation of a city ordinance, defendant had a gun and pointed it at the officers making the raid and arrest, was properly admitted for the purpose of proving him guilty of the crime with which he was charged, namely, the violation of the ordinance against running a gambling house, even though it was at the same time proof of another offense. This was held to be competent as throwing light on his guilt of the offense charged.

In a dissenting opinion, one member of the bench attacks the decision of the court, and makes the statement that *Rosetto v. City of Bay St. Louis* does not apply. This statement is based on the contention that the two crimes were not committed at the same time. Neither were the two crimes in *Brown v. State* committed at the same time. It is the contention of the state here that the fact that Brown made the murderous attack on the witness, Gaines, is evidence tending to prove that he was guilty of the crime charged, because of his apparent urgent desire to escape.

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[1]Some of these exceptions are: General tendency to prove defendant's guilt, or to prove particular matters, such as identity, knowledge, intent, malice, motive, plan or system of criminal action or continuing offense. 16 C. J. § 587.

[2]"Where the commission of a crime is proved, evidence to identify accused as the person who committed it is not to be excluded solely because it proves or tends to prove that he was guilty of another and independent crime." 16 C. J. § 589.

[3]97 Miss. 409; 52 So. 785 (1910).

It is thus apparently on all fours with *Rosetto v. City of Bay St. Louis,* for the only purpose the defendant in that case might have had in drawing a weapon on the officers would have been to escape, and had he not been guilty, there would have been nothing from which to escape.

Wigmore, in his work on Evidence, also recognizes the exception referred to above.[4]

Evidence of crime is sometimes so inseparably connected with another crime that proof of one necessarily involves proof of the other. Such evidence cannot be excluded merely for that reason.[5]

Flight has always been considered an indication of guilt. There seems to be no conflict of opinion among the authorities as to the admissibility of evidence of flight for the purpose of proving guilt. "The wicked flee, even when no man pursueth, but the righteous are bold as a lion."[6]

Thus it appears that the commission of the two crimes and the flight of defendant are so closely related that evidence of the first crime and of the flight cannot be presented without presenting also evidence of the second crime. It has been clearly established in Mississippi that evidence tending to prove the guilt or identity of the accused will not be excluded simply because it also tends to prove the defendant guilty of another crime.[7]

It appears to be the contention of the author of the dissenting opinion,[8] that evidence of the fact that the defendant had also committed the crime of shooting another, a white man, influenced the jury in returning such a verdict that made the death penalty mandatory. The penalty thus prescribed was the maximum provided by the statute,[9] and the contention is that the evidence admitted over the objection of the defendant gave rise to prejudice in the minds of the jurors, thus influencing the severity of the punishment fixed, and that therefore the admission of such evidence was error.

In support of this argument, several casses are cited. One of them, *Willoughby v. State,*[10] is as follows: Defendant was charged with robbing a bank, being identified by the cashier. The cashier also identified him as one of the two men who came to his home on a subsequent night, and at the point of a gun forced

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[4]"Where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by a defendant does not stand in the way of receiving the evidence." 1 WIGMORE, EVIDENCE (2nd. Ed.), § 416. See, also § 218.

[5]*Willoughby v. State,* 154 Miss. 653, 122 So. 757 (1929).

[6]1 WIGMORE, EVIDENCE (2nd. Ed.), § 275. The author goes on to say: "In our primitive system of law, the accused who fled, whether innocent or guilty, suffered forfeiture and escheat; though this was rather a mode of deterring him from refusing to appear for judgment than an evidential rule. It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." Also: *Johnson v. State,* 17 Ala. 618, 624 (1850); *Starr v. U. S.,* 164 U. S. 627, 1 S. Ct. 223, 41 L. Ed. 547 (1896); *Alberty v. U. S.,* 162 U. S. 499, 16 S. Ct. 864, 40 L. Ed. 1051 (1896).

[7]*Willoughby v. State,* 154 Miss, 653, 122 So. 757 (1929); *Craft v. State,* 155 Miss. 465, 124 So. 488 (1929).

[8]Justice Anderson, Mississippi Supreme Court.

[9]Laws of 1932, C. 328, prescribes that the penalty for robbery with the exhibition of a deadly weapon shall be punishable by death if the jury shall so fix it; otherwise, the court shall fix the penalty at imprisonment in the penitentiary for any term not less than three years.

[10]154 Miss. 653, 122 So. 757 (1929).

him to go to the bank, open the vault, and give them the money therein. The Court held that the trial court erroneously admitted as evidence a twenty-dollar bill, which was found in the home of the defendant when he was arrested. The court said: "*If we concede* that the twenty-dollar bill in question did not pass over the counter of the bank in due course of business and that it was sufficiently identified for the jury to pass upon whether or not it was the same bill, and *if we should say* that because it was found in a dwelling occupied by the appellant and several others that there was sufficient identification to make this bill a circumstance to connect the defendant with the second robbery, then under what theory was this evidence competent?" It is on the language just quoted that the dissenting opinion relies. But in the same case, the court goes on to add: "The one exception—is that the evidence to identify the accused—*is not to be excluded* simply because such evidence proves, or tends to prove, that he was guilty of another and independent crime." Thus it appears that this evidence was excluded on grounds of irrelevancy and remoteness, and not merely because it tended to prove the defendant guilty of another crime.

In *Craft v. State*,[11] also cited in the dissenting opinion, the court held it to have been error to have admitted evidence to the effect that at dates prior to the one on which the defendants were indicted for illegal manufacture of liquor, they were seen making liquor. But this ruling seems to have been made on the grounds that the evidence was irrelevant. In fact the court states: "In a criminal trial, the evidence offered should be relevant to the issue presented by the indictment and the plea of not guilty." The court also states: "It is true that competent evidence will not be excluded simply because the evidence proves—that the party was guilty of another and independent crime, but all the evidence in the case must be pointed at the crime charged in the indictment." The court also ruled that articles with which such a crime might or might not have been committed which were previously found nearby could not be introduced as evidence, but this ruling was also based on the grounds of irrelevance.

In *Baygents v. State*,[12] also cited, the defendant was charged with rape, and the court held to be error the admission of testimony to the effect that the defendant had, on the same night that the rape was committed, stolen a suit of clothes from a person in a room adjoining that in which the rape was committed. The further language used by the court in this case seems to be directly in line with the majority decision in the Brown case. The court says: "Where one crime is shown to be intimately connected with another, so as to furnish the motive for the commission of the crime charged, it is permitted to prove such other crime." Also: "Another (exception to the general rule), when the several crimes may have sprung from a single motive aiming at the accomplishment of the same end." Still again: "Another (exception), when one crime may have been perpetrated for, or as a means of committing, concealing *or escaping from,* another."

This latter exception, especially, would appear to cover the instant case, and to be sufficient reason, alone, for admitting the testimony objected to . The purpose for which the testimony as to the shooting of the witness, Gaines, was admitted, was to show by proof of the desperate attempt of the defendant to escape, when there is not shown any other reason why he should have shot Gaines, that the party doing the shooting was the one who committed the robbery. This is a most logical line of reasoning, and the testimony appears to be relevant.

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[11]155 Miss. 465, 124 So. 488 (1929).
[12]144 Miss. 442, 110 So. 114 (1926).
[13]82 Miss. 252, 33 So. 973 (1903).

There is not cited any authority which lays down the rule that certain evidence cannot be introduced, merely because sufficient evidence has already been produced to prove the identity of the defendant. Such a rule would constitute the judge the determinant of the weight of the evidence, because he could not rule out certain testimony under such a rule without finding that the fact sought to be established had already been sufficiently established. To do so would be to make a finding of fact, and constitute an invasion of the province of the jury.

But that is the very argument which the dissenting opinion seems to advance. In substance, the theory offered is that since the identity of the defendant has been established by his confession, evidence of the subsequent crime should not have been introduced. The defendant took the stand in his own behalf when the defense was putting on its testimony, which by the rules of criminal procedure, was after the state had completed its case. Had the trial court ruled out the testimony objected to, and the defendant then repudiated his confession, on which the state would have been forced by the ruling to rely for identification, the court would have been placed in a ridiculous situation, as the identification would then have failed. From the nature of the case, the identity of the defendant was capable of establishment only by circumstantial evidence, which the defendant might repudiate when placed on the stand in his own defense.

If the rule in criminal cases were the same as that applied in civil cases, that the plaintiff must prove his case by a preponderance of the evidence, then there might be some slight excuse for such a ruling. But in a criminal prosecution, the state carries the burden of proving the guilt of the defendant beyond a reasonable doubt. Surely, the more evidence of guilt that is introduced, the less is there a probability of the existence of reasonable doubt in the minds of the jurors.

Thus, an examination of the cases cited by the author of the dissenting opinion appears to reveal that those cases support, not the dissenting opinion, but the opinion of the majority of the court.

State v. Pittman,[14] goes further in admitting evidence of other crimes for the purpose of proving the identity of the defendant as the perpetrator of the crime charged than any of the cases previously discussed. A revenue officer was murdered in a raid on an illicit distillery. Two men were seen to run away, one of whom was soon captured. The defendant was suspected of being the other, and was charged with the murder. The court admitted testimony as to the distinguishing characteristics of other distilleries operated at other times by the defendant for the purpose of proving that this one was his, since it was operated in the same manner, as tending to prove him guilty of the murder.

Thus, a closer examination of the authorities cited in the dissenting opinion, and a study of the general principles of criminal prosecution and of evidence leads to the conclusion that the dissenting opinion is without strength, and that the decision of the court on this case is imminently correct.

William A. Stigler

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[14] ..... S. C. ....., 134 S. E. 514 (1926).

DEATH—GRATUITIES AS AN ELEMENT OF DAMAGES FOR WRONGFUL DEATH OF MINOR

Appellee, as administratrix representing herself and the decedent's brothers and sisters, sued for the death of her minor son, caused by the alleged negligence of the defendant as the owner and driver of an automobile upon a public highway. The Supreme Court allowed as one of the three elements of damages compensation estimated on the present net value of any pecuniary benefits which the evidence disclosed that the beneficiaries had reasonable expectation of receiving from the decedent during their respective lives had he continued to live. *Avery v. Collins*, ... Miss. ....., 157 So. 695 (1934).

One of the most frequently arising questions in connection with the law of "death by wrongful act" is in regard to the measure of damages to be allowed for the death of a minor child. Any ground of action for damages in these cases is entirely statutory, there having been, peculiarly, no right of action at common law for wrongful causing of the death of a person. Hence the extent and character of the law in each state will depend upon the provision of the statutes of the state in question. Lord Campbell's Act remedying the common law situation was adopted in 1846, and statutes in most of the American states are modeled after this act.[1]

The Mississippi rule in regard to this element of damages is as follows: "The award of damages for the loss by a parent includes the loss of the probable gratuities, using that term in a broad sense, as there is a reasonable expectation of receiving either before or after majority, but no allowance for gratuities may be made except upon evidence of gratuities which had been received in the past. This feature is limited by the life expectancy of both the minor decedent and of the parent. Brothers and sisters may also recover for gratuities, using that term in a broad sense, reasonably to have been expected as a probability, but this also must be based on evidence of previous gratuities, as well as on the respective life expectancies otherwise the issue would degenerate into mere possibilities or speculations or conjectures.[2] This has been the Mississippi rule ever since the construction placed on the statute,[3] as amended by the Acts of 1898, by Whitfield, C. J.[4]

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[1]Note, 13 VA. LAW. REV. 392, 1927.

[2]Cumberland Telephone & Tel. Co. v. Anderson, 89 Miss. 732, 41 So. 263 (1906)—see comment on this case in New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 897, 85 So. 104 (1920).

[3]Code 1930, Sec. 510.

[4]Chief Justice Whitfield in Cumberland Tel. & Tel. Co. v. Anderson, *supra*, says: The case of Railroad Co. v. Watley, 69 Miss. 145, 13 So. 145, laid down the rule that, in an action by the parent for the negligent killing of his child, the measure of damages was "compensation limited to the actual pecuniary loss sustained, on the theory of the parent's right to the services of the child during minority." But to this we think should be now added, under Ch. 65, page 82, of the Acts of 1898, the other three elements of damage named, one of which was "any such gratituties as the evidence may show the mother had reasonable expectation of receiving before or after majority." This act of 1898, changed the rule announced by the court in Railroad Co. v. Pendergrass, 69 Miss. 425, 12 So. 954 (1891), that there could be no recovery at all for instantaneous death, and then, in fixing the amount of damages uses this language: "The party suing shall recover such damages as the jury shall assess, taking into consideration all damages of every kind to any and all parties." We think the legislature intended to authorize a recovery, in a suit of this character such gratuities as the evidence may show the plaintiff had reasonable expectation of receiving before or after majority. The court refused to go as far as to allow "any possible gratuities" but limits it to "such gratuities as the plaintiff might reasonably have expected under the evidence she would receive."

As to just what probable gratuities mean it is questionable, but the courts[5] have held that a gratuity is something given without consideration therefor. Thus it would seem that a child's services to its parents, and contributions by the child for his own maintenance, are not gratuities. At first sight it appears that the Mississippi courts have gone to the extreme in allowing the recovery of gratuities for the wrongful death of a minor. How does the court know that the minor will continue to make these contributions? Isn't the court allowing speculative damages to be recovered in such cases since there is no proof that the decedent would not have changed his mind?

However, the Mississippi courts are not in a class all by themselves. Tiffany[6] makes this statement: "The loss includes any pecuniary benefit which the beneficiary might reasonably have expected to have received during the lifetime of the deceased by gift." An Indiana case,[7] which is typical of the holding in a number of states,[8] announces the rule to be that "The amount of damages recoverable should be predicated upon the conditions existing, and the contributions made, and being made, by the decedent to such next of kin, at and prior to his death, as shown by the evidence in this case." The contributions or gifts of a child to a parent must be of sufficient regularity to evidence a reasonable expectation of pecuniary benefit to parent for the continuance of the life of the deceased.[9]

The general rule in a number of other states[10] is that in an action by a parent to recover for the death of a minor child, the pecuniary loss suffered by the parent by reason of such death is the measure of his damages. Hence, the present value of the probable contributions by the child to the use of the parent, whether in money or in services, taking into view the probable cost of the child's maintenance and education, is the principal element of damages for the consideration of the jury.[11] This rule according to the decisions does not include gratuities.

By its very nature, the problem of measuring damages under the wrongful death statutes is one to which bare legal principles can afford but an awkward solution. Those principles which have been developed serve only to confine the jury's speculation within reasonable, if necessarily elastic bounds. Because the elements of damage in each case are almost entirely personal, good sense on the part of both jury and court must to a large degree supplant either logic or principle as the determinant of the compensation awarded. In consequence, one who searches the many decisions for evidences of the latter doubtless will develop some sympathy with these words of Sandels, J.: "And upon a thorough examination of the authorities it is a matter of no little concern that we find the opinions of the courts as divergent and unsatisfactory as the verdicts of the juries upon which they passed."[12]

LOUIS HENGEN

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[5]Gratuity: WORDS & PHRASES, 1st and 2nd series.

[6]TIFFANY, DEATH BY WRONGFUL ACT (2nd Ed.), § 159.

[7]Hines v. Nichols (Ind), 130 N. E. 140 (1921). A case on all fours is Inspiration Consol. Copper Co. v. Bryan, ... Ariz. ...., 276 Pac. 846 (1929).

[8]Texas, Colorado, Illinois, Florida, Georgia, Kansas, Michigan, Maryland, Nebraska, California, North Carolina, Arizona and Minnesota.

[9]L. R. A. 1916 E, 197.

[10]Arkansas, Iowa, Kentucky, Maine, New York, Utah, Washington, Wisconsin, North Dakota, Pennsylvania, Rhode Island, Dist. of Columbia, U. S. Fed. and C. C. A. Courts, Canada, and England.

[11]Ann. Cas. 1912 C, 66.

[12]16 MINN. LAW REV. 409.

FIXTURES—RIGHT OF PRIOR MORTGAGEE OF REALTY TO SUBSEQUENTLY ANNEXED PERSONAL PROPERTY, WHERE TITLE IS RESERVED

Complainant dug and installed an artesian well for the Gulf Coast Ice Company, reserving title to the machinery and fittings, and stipulating that it was to remain personal property until paid for. Prior to the execution of this contract, the Gulf Coast Ice Company had executed a deed of trust to the Anticich Packing Company as beneficiary, conveying the premises to Swetman, as trustee. HELD: The complainant is entitled to the machinery. ..... Miss. ....., 157 So. 84.

It is a well settled rule that an agreement between the owner of realty and the owner of a chattel that the chattel shall remain personalty until paid for, even though physically attached to the realty, is binding between the parties; it is also well settled that such an agreement does not affect the rights of a subsequent bona fide purchaser or incumbrancer without notice.[1] As to the rights of the chattel owner as against the rights of a prior mortgagee of the realty, there is a well defined split of authority.[2] Under the New Jersey rule—followed in a majority of the common law jurisdictions—the rights of the chattel owner are held to be superior to those of the prior mortgagee of the realty.[3] This is generally held to be true, even where the real mortgage contains an after acquired property clause.[4] On the other hand, the Massachusetts rule holds the rights of the prior mortgagee to be superior to those of the chattel owner.[5]

The New Jersey rule is based on equitable grounds and is ably stated by the court in the Campbell case[6] as follows: ". . . it is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage, that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long therefore as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is therefore no inequity toward the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former."

On the other hand, the Massachusetts rule is placed squarely on legal principles. It proceeds upon the ground that the chattel has become a part of the realty on which the prior mortgagee has a paramount lien, and that no agreement to which he is not a party can in any way affect his rights.[7]

Even jurisdictions holding to the New Jersey rule agree that the prior mortgagee of the realty must prevail where removal of the chattel would cause material injury to the freehold.[8] What constitutes material injury to the freehold is another problem and will be discussed later.

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[1]Dauch v. Ginsburg, 214 Cal. 541, 6 P. (2nd.) 952 (1931).
[2]26 C. J. 684, § 49.
[3]Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 A. S. R. 889 (1888).
[4]26 C. J. 685, § 50.
[5]Meagher v. Hayes, 152 Mass. 228, 25 N. E. 105, 23 A. S. R. 819 (1890); 26 C. J. 685 § 49.
[6]Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 A. S. R. 889 (1888).
[7]Clary v. Owen, 15 Gray (Mass., 1860) 522.
[8]Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 A. S. R. 889 (1888).

The decision in the principal case puts Mississippi squarely under the New Jersey rule for the first time. The court cites two Mississippi cases[9] as authority for their decision. Although these cases do have some bearing on the point at issue, they are easily distinguishable and must be classed as persuasive, rather than imperative, authority. Both cases involved a subsequent holder of the realty with actual notice of the rights of the conditional vendor. However, both cases do seem to indicate that the intention of the parties governs in cases of fixtures and that an agreement that the chattel shall remain personal property, though attached to the realty, is controlling.

The passage, by several states, of the Uniform Conditional Sales Act has created much uncertainty and instability in cases involving contests between conditional vendors and prior mortgagees of the realty to which the chattel sold has been attached. This has been caused by the variance of the courts in construing Section seven of the Uniform Conditional Sales Act. This section provides that, as to goods which are so affixed to realty as to become a part thereof and not to be severable wholly, or in any portion, without material injury to the freehold, the reservation of property as to any portion not so severable shall be void as against any person who has not expressly assented to the reservation.

The New Jersey courts have interpreted the phrase "material injury to the freehold" to mean material injury to the going concern.[10] The court, in the Future Building and Loan Association case,[11] says: "Material injury in detaching, not intention in attaching, is the test . . . the word 'material,' as used in the statute, in one sense, means material injury to the structure; but it also connotes injury to the institution of which the structure is a part." It can readily be seen that, under this view of the statute, many articles that would be considered personalty under the old New Jersey rule would now be considered realty. This interpretation has also created a situation in which an article will be considered personalty in a private home and realty in an apartment house.[12]

The California courts have gone further than the New Jersey courts in this direction, and without the agency of the Uniform Conditional Sales Act. California has long followed the old New Jersey rule,[13] but in the cases of *Dauch v. Ginsburg*[14] and *Hammel Radiator Corporation v. Mortgage Guaranty Company*,[15] it was held that the rights of the prior mortgagee must prevail if his security, as it stood before the article was removed, was materially diminished. This principle has been severely criticized.[16] As it pointed out in one of these criticisms, it is difficult to imagine very many cases in which the security would not be materially

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[9]John Van Range Co. v. Allen, 7 So. 499 (1890); Duke v. Shackleford, 56 Miss. 552 (1879).

[10]MacLeod v. Satterthwait, 109 N. J. Eq. 414, 157 Atl. 670 (1932); Domestic Electric Company, Inc. v. Mezzaluna, 109 N. J. L. 574, 162 Atl. 722 (1932); Future Bldg. & Loan Ass'n. v. Mazzochi, 110 N. J. Eq. 422, 152 Atl. 776 (1931).

[11]Future Bldg. & Loan Ass'n. v. Mazzochi, 110 N. J. Eq. 422, 152 Atl. 776 (1931).

[12]Reliable Bldg. & Loan Ass'n. of Newark v. Purijoy, 111 N. J. Eq. 575, 163 Atl. 722 (1932).

[13]Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107 (1880); Tibbets v. Moore, 23 Cal. 208 (1863).

[14]83 Cal. Dec. 60, 6 P. (2nd.) 952 (1931).

[15]18 P. (2nd.) 993 (Cal., 1933).

[16]20 CALIF. L. REV. 568; 19 IA. L. REV. 378.

diminished under this rule. Certainly such a rule is not in line with the equitable principles laid down by the New Jersey court in the Campbell case.[17]

On the other hand, the Wisconsin courts, which formerly followed the Massachusetts rule,[18] now follow the old New Jersey rule with regard to conditional sales. They interpret the "material injury to the freehold" phrase in the Uniform Conditional Sales Act to mean physical injury.[19] They are supported in this view by the New York courts.[20]

It seems to be the Federal rule that, even in cases where removal of the article would cause material injury to the freehold, the article may be removed if the prior mortgagee is indemnified for the injury.[21] This rule is also followed in West Virginia.[22] There is dictum in Wyoming to the effect that, where the article annexed replaces another article, annexed at the time the mortgage was given, the mortgagee has an action of waste for the value of the article replaced.[23] In such cases, it would seem better to follow the Federal rule and require the owner of the chattel to indemnify the prior mortgagee of the realty before the property could be removed. It would be inequitable to compel the prior mortgagee to bring a suit for waste in order to protect his security.

The old New Jersey rule, followed by the court in the principal case, and the interpretation given the Uniform Conditional Sales Act by the Wisconsin and New York courts, seem to be the better from the standpoint of justice. The prior mortgagee loses nothing that he had at the time he took his mortgage. The mortgagee acquires his mortgagor's equity of redemption in the article annexed.[24]

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[17]Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 A. S. R. 889 (1888).

[18]Franklyn v. Moulton, 5 Wis. 1 (1855); Fuller Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698 (1901).

[19]People's Savings & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933).

[20]Harvard Financial Corp. v. Greenblatt Const. Co., 261 N. Y. 169, 184 N. E. 748; affirmed in 261 N. Y. 169, 185 N. E. 796 (1933).

[21]Detroit Steel Co. v. Sisterville Brewing Co., 233 U. S. 712, 34 S. Ct. 753, 58 L. ed. 1166 (1914).

[22]Hurxthal's Executrix v. Hurxthal's Heirs et al., 45 W. Va. 584, 32 S. E. 237 (1898).

[23]Holland Furnace Co. v. Bird, 45 Wyo. 471, 21 P. (2nd.) 825 (1933).

[24]Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 A. S. R. 889 (1888).

CONSTITUTIONAL LAW—IMPAIRMENT OF THE OBLIGATION OF CONTRACTS—EMERGENCY LEGISLATION

The Tucker Printing Co. furnished Attala County with a number of printed supplies for the Sheriff's office to be used in connection with the "Game and Fish Laws."[1] For these supplies the Board of Sup'rs. issued a warrant payable out of the "Game and Fish Fund." At the time of the issuing of the warrant there was no money in this fund, nor has there been anything since. This warrant was issued in July, 1931, and in December, 1931, the Tucker Printing Co. asked the Board of Sup'rs. either to pay the warrant or issue bonds and sell them to pay the indebtedness. The board did neither. In 1932 the entire "Game and Fish" chapter of the code was repealed with the exception of one section which did not relate to this case. The repealing statute made no provision for the payment of outstanding warrants issued on the game and fish fund. HELD: The holder of the warrants could compel the Board of Sup'rs. by mandamus to issue and sell bonds of the county in sufficient amount to pay the warrants after the repeal of the "Game and Fish Laws." *Tucker Printing Co. v. Board of Sup'rs. of Attala County*, ... Miss. ....., 158 So. 336 (1934).

The decision in the instant case was rendered in December, 1934. In June of this same year, 1934, the Supreme Court decided the case of *Dunn et al v. Love*.[2] In that case, in relation to the law governing the obligations of contracts, the following statement was made in the opinion: "It is to be admitted that a stockholder in taking stock in a bank, at the time here involved thereby became bound in contract to the statutory stockholder's liability in favor of depositors. At the same time the depositors, when becoming such creditors knew that this contract was one made not only as a part of the existing laws providing for the administration of that liability in favor of all depositors, and ratably among them by state agencies designated by law for that purpose, but also that the contract so made and the liability so incurred was one subject to subsequent laws reasonably enacted or to be enacted under the sovereign power of the state to legislate and to administer in the vital interest of the general welfare."[3]

In the Tucker Printing Co. case there was involved, as in the case of *Dunn et al v. Love*, a question concerning the impairment of the obligations of contracts. The following is from the opinion of the court: "It is argued by appellee that the repeal of the statute abrogated that obligation and left no means by which it could be discharged. Under the provision of the Federal Constitution (Article 1, paragraph 10) prohibiting the states from passing any laws impairing the obligations of contracts, and under Section 16 of our Constitution which has the same inhibi-

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[1] MISS. CODE ANN. 1930, c. 115, § 4705-4763.

[2] ..... Miss. ....., 155 So. 331 (1934). This was a case involving the liquidation of a bank which had become insolvent. While in the state of liquidation a new state banking law was passed, Miss. Laws of 1932, C. 251, under which law the bank could be reorganized and re-opened. The majority of the depositors wanted to stop the liquidation and re-organize under the new Banking Act but there were some who desired to continue under the liquidation proceedings, claiming that any other procedure would be an impairment of the obligations of a contract. HELD: The carrying out of the reorganization under the new banking laws was permissible and would not impair the obligations of the contract.

[3] The following cases were cited by the court as authority: Milner v. Gibson 249 Ky. 594, 61 S. W. (2d) 273 (1933); Christensen v. Merchant's Bank (Miss.), 150 So. 375 (1933); Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931); Home Bldg. Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481 (1933).

tion against such legislation the repealing act would impair the obligation of the contract, and therefore would be void to that extent. . . . Legislation of a state impairing the obligation of a contract made under its authority is void, and the courts, in enforcing the contract, will pursue the same course and apply the same remedies as though such void legislation had never existed. The law in force at the time the contract was made forms a part of it, and is written into the contract as much as if expressly incorporated therein."[4]

By a comparison of the above quotations it may be seen that within six months the Supreme Court has laid down two principles of law on the same subject, namely, the law which controls the obligations of a contract, and these two principles, seemingly, are directly opposed. The cases differ, it is true, in the subject matter involved and the amount of money at stake. In the *Dunn et al v. Love* case there was approximately three quarters of a million dollars to be adjudicated, while in the latter case the amount in controversy was only three hundred and forty two dollars.

One might safely say that the Supreme Court departed from an established principle of law (as to what law governs the obligations of contracts) as laid down in a long line of decisions[5] when they decided the case of *Dunn et al v. Love.* The cases which they cited in the majority opinion of this case were practically all late decisions, having been adjudicated during this recent period of depression.[6] In the dissenting opinion, however, were cited a number of decisions which the Supreme Court used in support of their opinion in the *Tucker Printing Co. v. Attala County* case.[7]

Why did not the Supreme Court follow the principle of law which they laid down in the case of *Dunn et al v. Love* when they rendered the decision in the case of *Tucker Printing Co. v. Board of Sup'rs. of Attala County?* Could they not justly say that Tucker Printing Co. knew when they made this contract for supplies with Attala County that the contract would be subject to the enactment of future laws? In answer to these questions reference may be made to a prediction

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[4]The following cases were among those cited by the court as authority. Some of the cases cited were omitted because of the number. Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Ennis Waterworks v. Ennis, 233 U. S. 652, 34 S. Ct. 767, 58 L. Ed. 1139; Price v. Horley, 142 Miss. 584, 107 So. 673.

[5]This theory of law has extended far back into the early legal history of the United States. The case of Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606, decided in 1827 states: "It is said in a learned judgment delivered from a tribunal entitled to great respect that all contracts are to be construed and executed according to the lex loci contractus, and the obligation of the contract is, what the law of the place makes it. Hence it is inferred that the insolvent laws of the state in which any contract is made form a part of the obligation of the contract."

In 1866 in Mississippi the Supreme Court adopted this same theory in Coffman et al v. The Bank of Kentucky, 40 Miss. 29. No attempt will be made here to trace the line of decisions down to the present; these cases are cited merely to show at what an early period the courts established the theory above mentioned.

[6]*Supra,* Note 4. These cases were decided during the worst period of the depression. Bank failures were common in every city and business firms were becoming insolvent or closing up because of lack of business. The public was calling for relief.

[7]The following cases were cited in both the dissenting opinion of Dunn et al v. Love and in support of the decision in Tucker Printing Co. v. Board of Sup'rs. of Attala County. Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. Ed. 146; McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397; U. S. ex rel Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403; Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

made in a comment on the case of *Dunn et al v. Love* in 7 Mississippi Law Journal 322: "It may be admitted that the rights of all the people have not been taken into consideration but it may be pointed out also that once the emergency, which has called forth such action, has passed and readjustment has taken place this case will probably bear no weight with the courts." Probably the questions can not be answered in a satisfactory manner, but a solution may be suggested by a consideration of the external factors operating to influence the court in the two cases, by pointing out the fact that the decision in *Dunn et al v. Love* was probably affected by a feeling of necessity and policy and was so rendered in order to give relief to the majority of the public, all of whom were affected by the frequent bank failures.

It is quite evident, however, that the Supreme Court did not give this case much thought nor its authority much weight in deciding *Tucker Printing Co. v. Board of Sup'rs. of Attala County.* Should this lead one to think that the law in the former case is not to be considered decisive authority? Seemingly it does, but one should not jump at conclusions, for judging by the past, the Supreme Court would not hesitate to invoke the principles of *Dunn et al v. Love,* should they believe a necessity for so invoking it existed.[8]

O. L. Casey

[8]Courts are becoming more liberal in their interpretation of the laws and the Constitution in order to give relief to the public under any unforseen circumstance which might arise. Said the court in Dunn et al v. Love, ... Miss. ....., 155 So. 333 (1934), in adopting a view similar to that given by the U. S. Supreme Court in Bain v. Pinson, 282 U. S. 449, 51 S. Ct. 228, 75 L. Ed. 482: "In considering legislative and administrative efforts at salvage and rehabilitation, in the distressing situation with which the country has been and is yet confronted, we must not permit ourselves to be maneuvered into positions which would view the Federal and State Constitution as sculptured idols, frowning with changeless features upon a changing world."